MULTNOMAH COUNTY
LAND USE AND TRANSPORTATION PROGRAM
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Finding: Report

Administrative Decision by the Planning Director; Category 1 Land Division; Conditional Use Permit for Development Within the Protected Aggregate and Mineral Resources Overlay Subdistrict; Road Rules Variance; Significant Environmental Concern Permit; Hillside Development Permit; Exception to Secondary Fire Safety Zone, Adjustment to Forest Practices Setback

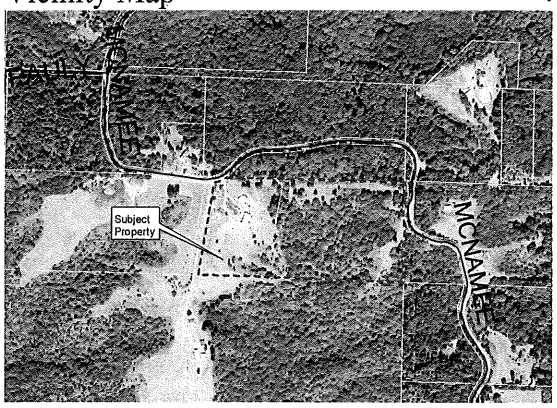
Case File: T3-2010-907

Hearings Officer: Liz Fancher

Hearing Date, Time, & Place:

July 8, 2011 at 9 am in Room 103 at the Land Use Planning Division office located at 1600 SE 190th Avenue, Portland, OR 97233.

Vicinity Map N↑



Location:	13225 NW McNamee Road Map: 2N1W32B, Tax Lots: 700 & 800 W.M. Tax Account: R971320410 & R971320400
Applicant(s):	Larry and Laura Luethe
Owner(s):	Larry and Laura Luethe
Summary:	The applicants request approval of a Conditional Use Permit for a Category 1 Land Division and for residential development within the Protected Aggregate and Mineral Resources Overlay Subdistrict (PAM), Administrative Decision for implementation of state Measure 49 approval, Significant Environmental Concern for wildlife habitat (SEC-h) permit, Hillside Development permit for residential development, Exception to Secondary Fire Safety Zone, Adjustment to Forest Practices Setbacks and a Road Rules Variance for proposed access onto NW McNamee Road.
Base Zone:	Commercial Forest Use – 2 (CFU-2)
Overlay Zones:	Protected Aggregate and Mineral Resources Overlay Subdistrict (PAM), Significant Environmental Concern for wildlife habitat (SEC-h), Significant Environmental Concern for streams (SEC-s), and Hillside Development (HD).
Site Size:	18.91 acres

Applicable Approval Criteria: Multnomah County Code (MCC):

Category 1 Land Division: MCC 33.7705, 33.7765, 33.7770, 33.7800-33.7825, 33.7865-33.8035

Conditional Use Permit for Dwellings in the Protected Aggregate Mineral Impact Area Overlay: MCC 33.6300 – 33.6350 and 33.5700 – 33.5745

Significant Environmental Concern for Wildlife Habitat: MCC 33.4500-33.4550, 33.4570

Hillside Development Permit: MCC 33.5500-33.5525

Commercial Forest Use Zone: MCC 33.2200-33.2310

Exceptions for Secondary Fire Safety Zones: MCC 33.2310

Adjustments: MCC 33.7601-33.7611

Road Rules Variance: Multnomah County Road Rules (MCRR) 16.000 MCRR 4.000

Administration and Procedures: MCC Chapter 37

Measure 49: Oregon Administrative Rules (OAR) 660-041-0000 – 660-041-0530

Hearings Officer's Decision

The Hearings Officer denies the applicant's request for approval of a Conditional Use Permit for a Category 1 Land Division and for residential development within the Protected Aggregate and Mineral Resources Overlay Subdistrict (PAM), Administrative Decision for implementation of state Measure 49 approval, Significant Environmental Concern for wildlife habitat (SEC-h) permit, Hillside Development permit for residential development, Exception to Secondary Fire Safety Zone, Adjustment to Forest Practices Setbacks and a Road Rules Variance for proposed access onto NW McNamee Road.

Dated this 30th day of September, 2011.

Liz Fancher, Hearings Officer

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Finding: analysis and comments are identified as '**Finding:**' and address the applicable criteria. Finding: comments may include a conclusionary statement in *italic*.

1.00 Project Description:

The applicants seek to implement a Measure 49 approval (State Final Order E118605) and create a three parcel partition of the existing 18.91-acre subject tract. Proposed Parcel 1 would be a 2-acre flag lot located at the southwest corner of the existing property and would contain one single-family dwelling. Proposed Parcel 2 would be a 2-acre flag lot located at the southeast corner of the existing property and would contain one single-family dwelling. Proposed Parcel 3 would constitute the remaining 15.08 acres and would contain the existing single-family dwelling. Parcel 3 results in an unusual configuration due to the fact that the eastern 90 percent of the parcel appears split from the western 10 percent of the lot. At first glance, the parcel would appear to be cut in two by proposed Parcel 1; however, proposed parcel 3 would actually be contiguous due to a 1 foot wide strip that would wrap around Parcel 1 to connect the western portion of Parcel 3 with the eastern portion. The applicant has proposed a reciprocal easement for joint use of the Parcel 1 access strip in order for the owner (and future owners) to retain access to both the eastern and western portions of the Parcel 3.

The proposal includes a new driveway access (to serve Parcel 2) onto NW McNamee Road; the applicants are requesting a Road Rules Variance because the proposed access location does not meet the sight distance standards of the Multnomah County Road Rules (MCRR).

The majority of the existing subject property is located in the Protected Aggregate and Mineral Resources Overlay Subdistrict (PAM). The proposed residential development on Parcels 1 and 2 would be located within the PAM overlay and a Conditional Use Permit is required in order to evaluate the potential impacts nearby aggregate resources.

The majority of the existing subject property is located in the Hillside Development (HD) overlay due to the steep slopes found on the property. A HD permit is required in order to evaluate the proposed residential development in steep slope areas.

The entire existing subject property is located in the Significant Environmental Concern for wildlife habitat overlay (SEC-h). An SEC permit is required in order to evaluate and mitigate the proposed development's impacts to wildlife habitat.

The entire existing property is located within the Commercial Forest Use – 2 (CFU-2) zoning district. The proposal must meet the applicable standards of the CFU-2 zone.

The applicant has also applied for an Exception to the Secondary Fire Safety Zone and for an Adjustment to the Forest Practices Setbacks for Parcels 1 and 2.

2.00 Property Description & History:

The existing 18.91-acre, CFU-2 zoned subject property is comprised of two tax lots (Lots 700 and 800 of Section 32B, Township 2 North, Range 1 West, Willamette Meridian). The property is located south and west of NW McNamee Road. The western third of the property is cleared and contains the existing dwelling and outbuildings on the northwest portion of the property. The western third of the property contains slopes that are predominately less than 25 percent. The middle third of the property is wooded and contains a ravine with relatively steep sides and a stream at the floor of the ravine. The stream begins

on the property and runs from north to south. The eastern third of the property contains mostly steep slopes (in excess of 25 percent). A relatively small, cleared portion of the eastern third of the property contains slopes that are less than 25 percent. An area adjacent to NW McNamee Road near the east property line was the location of a landslide that resulted from fill material located at the top of the slope giving way in 2009. Slope stabilization measures were employed in order to prevent further slope failures; the slope stabilization measures were reviewed and approved by the County through file T2-09-050. This steep area would be crossed by vehicles coming and going to the new lot proposed for the southeast part of the property.

3.00 Code Compliance:

3.01 MCC 37.05600 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.

Finding: There is an existing large metal shop building that is currently located across the existing common property line between the two existing properties and violates required setbacks. The current proposal will result in the existing shop building being located on Parcel 3. The property will come into compliance with all applicable provisions of the Multnomah County Code if Parcel 3 is configured to provide the required yard between the shop building and the new lot line for Parcel 1.

4.00 Compliance with Measure 49 State Final Order

On September 22, 2009 the Oregon Department of Land Conservation and Development (DLCD) conditionally approved a Measure 49 (ORS 195.300 to 195.336) claim filed by the applicants, Larry and Laura Luethe (Exhibit A.16). The approval allows for the creation of two new parcels that are less than the minimum lot size of the CFU-2 zone and allows a dwelling to be placed on each of the new parcels. Measure 49 limits the size of the two new parcels to two acres in size. The final order authorizes no more than one single-family dwelling on each of the three parcels (two new dwellings in addition to the existing dwelling.)

The property owner has a valid Measure 49 approval from the State of Oregon. The proposed partition and development, however, does not comply with the thirteen conditions of approval imposed by DLCD in its Final Order and Home Site Authorization, its approval of the Luethe's Measure 49 claim. The following subsections list each of the DLCD conditions of approval (*in italics*) followed by findings addressing the proposal's compliance with the conditions.

4.01 DLCD Condition #1:

Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimants are eligible for Measure 49 relief. The establishment of a land division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.

Finding: The applicant is seeking approval of three parcels. Each parcel would be developed with one single family dwelling. The applicant's proposed partition map (Exhibit A.43) shows a land division of the Measure 49 claim property (Lots 700 and 800). The site plan shows a proposed single-family dwelling for proposed Parcel 1 and a proposed single-family dwelling for proposed Parcel 2. Proposed Parcel 3 would contain the existing single-family dwelling. The application does not meet all applicable standards governing the siting or development of the land division and dwelling. In particular, the current law imposes a minimum lot size of 80 acres so no land division would be permitted and the applicant has not shown that the dwellings meet the standards that apply to approval of a dwelling in the CFU-2 zone (MCC 33.2235 and MCC 33.2240). In addition, the county's staff report implies that the Lot of Record provision of MCC 33.2275 could prevent approval of the application. Nonetheless, Measure 49 prohibits the county from enforcing those code provisions because they are not "reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law."

4.02 DLCD Condition #2:

This home site authorization will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).

Finding: The proposal for three parcels each containing one single-family dwelling is consistent with the findings and conclusions made in DLCD's Final Order of September 22, 2009 (Exhibit A.16). The DLCD approval does not, however, authorize approval of a land division or dwelling that will violate land use regulations defined in ORS 195.305(3). Subsection (3) provides:

> *(3) Subsection (1) of this section shall not apply to land use regulations that were enacted prior to the claimant's acquisition date or to land use regulations:*
>
> *(a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;*
>
> *(b) Restricting or prohibiting activities for the protection of public health and safety;*
>
> *(c) To the extent the land use regulation is required to comply with federal law; or*
>
> *(d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.*

No party identified what law applied on the claimant's acquisition date so the hearings officer is unable to determine whether any of the current land use regulations predate the acquisition date. The DLCD Order generally describes the type of rules that were in effect on the acquisition date but this information is not sufficient to make a finding that any of the current land use regulations were enacted prior to the

acquisition date. The hearings officer has not been provided any information to support a finding that any land use regulation is required to comply with federal law. The applicable laws do not restrict or prohibit the use of the property to sell pornography or for performing nude dancing. None of the applicable approval criteria restrict or prohibit activities commonly and historically recognized as public nuisances under common law.

The hearings officer finds that some of the applicable land use regulations restrict activities for the protection of public health and safety. These include, but are not limited to: MCC 33.7890, Land Suitability (if the lot is unsuitable due to conditions that threaten the safety of future residents); MCC 33.7955, Sewage Disposal (sewage disposal is needed to protect safety of groundwater consumed by future residents and neighbors); MCC 33.7960, Surface Drainage (to extent needed to prevent contamination of area groundwater and landslides); County Road Rules regarding sight distance on McNamee Road (inadequate sight distance is a cause of accidents when motorists cannot see approaching vehicles for a sufficient amount of time before entering the road); Hillside Development Permit rules (these rules were developed to address the risk of landslides on steep terrain; the subject property has experienced land slides); Fire Safety zones and forest practice setbacks (to the extent needed to protect new residents of the subject property from fire hazards and from death or injury from tree falling on adjacent properties in cases where an exception is not merited under the terms of the code); and MCC 29.012, Fire Appartus Means of Approach.

A land use approval would not waive any law that is not a land use regulation as the term is defined by ORS 195.300(14). As such, the applicants would remain bound to follow those laws in developing their property if this application were approved.

4.03 DLCD Condition #3:
A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimants have developed the limit of twenty home sites under Measure 49, the claimants are no longer eligible for the home site approvals that are the subject of this order.

Finding: The approval of this application would not entitle the claimant to more than 20 home site approvals under Sections 5 to 11 of Measure 49.

4.04 DLCD Condition #4:
The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.

Finding: No facts in the record merit a reduction in the number of parcels or dwellings that may be developed on the subject property.

4.05 DLCD Condition #5:
Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.

Finding: There are no temporary dwellings located on the subject property.

4.06 DLCD Condition #6:
A home site approval only authorizes the establishment of a new lot, parcel or dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which the claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.

Finding: The applicants do not own any contiguous property. The three proposed parcels and two additional dwellings are proposed within the limits of the Measure 49 claim property (Lots 700 and 800). The proposal does not exceed the three parcels and three dwellings allowed in the State's Final Order (Exhibit A.16).

4.07 DLCD Condition #7:
The claimants may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels or dwellings existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing lots, parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.

Finding: Currently there is one single family dwelling located on the existing subject property (Lots 700 and 800). The proposal would divide the existing property into three parcels and would result in the construction of two additional dwellings (each on a separate lot) (Exhibit A.43). The State Final Order (Exhibit A.16) allows the claimants (applicants) to create up to a total of three parcels each containing no more than one single-family dwelling each.

4.08 DLCD Condition #8:
The claimants may not implement the relief described in this Measure 49 Home Site Authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.

Finding: It is believed that the applicant does not have a vested right to develop his property as set forth in a Measure 37 waiver. If he has such a waiver, the home site authorization is void and the application cannot be approved.

4.09 DLCD Condition #9:
A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimants are eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.

Finding: The proposal would include one new single-family dwelling on each of the new lots (proposed Parcels 1 and 2). The residual parcel (proposed Parcel 3) will contain the existing single-family dwelling. No property would have more than one single-family dwelling.

4.10 DLCD Condition #10:
Because the property is located in a forest zone, the home site authorization does not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.

Finding: The existing subject property (Tax Lots 700 and 800) is located entirely on high-value forest land. ORS 195.300 defines high-value forest lands as land that is in a forest zone or a mixed farm and forest zone, that is located in western Oregon and composed predominantly of soils capable of producing more than 120 cubic feet per acre per year of wood fiber and that is capable of producing more than 5,000 cubic feet per year of commercial tree species. The existing subject property is located on the following soil types according to the Natural Resources Conservation Service (NRCS) (Exhibit B.6): Goble silt loam (55%), and Cascade silt loam (45%). Both of these soil types are capable of producing more than 120 CF/Acre of wood fiber according to the NRCS. The proposed partition would result in two newly created parcels of 2 acres each, and one remnant parcel of 15.08 acres. ORS 215.293 requires a condition of approval for new single-family dwellings in farm or forest zones; the condition of approval requires the land owner to sign and record a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.

4.11 DLCD Condition #11:
Because the property is located in a forest zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, if an owner of the property is authorized by other home site authorizations to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.

Finding: This condition of approval is not completely clear. It requires "new home sites" to be clustered. A home site could either be a new parcel or the land under a home. To resolve this ambiguity, the hearings officer looked to the text of Measure 49 that is referenced by this condition of approval.

Measure 49 says that, in a forest zone, "*new lots or parcels* created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use." This language makes it clear that a "new home site" is a new lot or parcel. Only new parcels, not every home on the subject property, must be clustered to preserve the remainder of the property for resource use.

In a typical partition, all parcels are "new parcels" because the partition creates each and every parcel shown on the partition plat. Under Measure 49, however, partitions create "new parcels" and a remnant parcel. New parcels are limited to a maximum of two acres in size. The remnant parcel is not subject to the maximum lot size. The clustering of the new lots is intended to maximize the suitability of the remnant parcel for forest use. The commonly understood meaning of the term "clustered" is "placed close together." At opposite sides of the parent parcel, separated by a ravine, proposed Parcels 1 and 2 are not clustered as required by Measure 49 or by the terms of the DLCD Final Order.

The Luethe property consists of two existing parcels and the DLCD Final Order says that the creation of one additional lot or parcel is authorized. When only one new parcel is being created it cannot be clustered with itself. If the applicant had proposed to retain the existing parcel boundaries and created one new parcel out of one of the two existing lots, clustering would not have been required. In that case, one of the two lots would be an existing lot, one lot would be a "new lot" and one lot would be a "remnant" parcel. In this case, however, the applicant has proposed a tentative plan that treats the two existing lots as one parent parcel.

The tentative plan removes the existing lot boundaries and divides the combined lots into three parcels. The tentative plan treats Parcels 1 and 2 as new parcels. Both comply with the maximum lot size of 2 acres. Parcel 3 is the remainder parcel of the combined lots. As the applicant chose to plat over historic lot lines rather than to divide one of the existing lots to create one new parcel, the partition must comply with the requirement that new parcels, Parcels 1 and 2, be clustered.

A number of arguments have been made to justify the proposed partition layout. They are:

(1) *There is no feasible alternative to the proposed plan due to the location of the steep sided ravine that bisects the middle of the property. The proposed location for Parcels 1 and 2 in relation to the existing dwelling on remainder Parcel 3 is the most appropriate since this area retains the larger forested area in the property's middle intact.*

This argument is not persuasive for two reasons. One, Measure 37 plainly requires that lots be clustered. That requirement was included in the DLCD Final Order. It is binding on the Luethes. The clustering requirement cannot be disregarded to achieve the purpose of the clustering requirement by disobeying the clustering requirement. If there is no feasible alternative to the proposed tentative plan, Multnomah County cannot solve the Luethe's problem by waiving a clear requirement of the DLCD Final Order. Second, there appears to be at least one alternative to the proposed plan that is feasible to the same extent as the current proposal.

One feasible alternative to the proposed partition plan would have been to propose two new parcels on the west side of the property. One new parcel would include the existing home and the other would be eligible for construction of a new home. The rest of the property would be the remnant lot. A new home could be placed on that lot – most likely in the area proposed for the Parcel 2 home or on the west side of the property. A new home on the remnant parcel might, also, be able to be located on the west side of the property if the new home lots were smaller than the two-acre parcel sizes proposed by the applicant.

This alternative, like the applicant's current proposal, requires approval of a road rules variance and compliance with land use regulations that cannot be waived. The hearings officer has not concluded, in this decision, that all such regulations have been met by the proposed land division and development plan or merit approval of a variance or exception. For instance, it is possible that the public safety hazard presented by the poor sight distance proposed for Parcel 2 would merit denial of a variance to county road rules.

Another feasible alternative might be to partition one of the two parent parcels to create one new parcel only. A home could then be placed or maintained on the existing parcel, the new parcel (maximum 2 acres) and the remnant parcel for a total of three homes. Clustering would not be required. The applicants would need to move or remove an outbuilding that is built over an existing property line but that is not a change from the status quo. This illegal condition is one of the applicants' own making and should be corrected regardless of the outcome of this application.

(2) *The Measure 49 Order does not allow the clustering requirement to supersede the grant of relief.*

The Measure 49 Order and law do not allow the county to apply its current land use laws in a way that prevents the applicant from obtaining the relief granted by the Order. The Order and the law do not prohibit the county from enforcing the plain requirements of the law and Order. In fact, Measure 49 requires the county to comply with its rules, including the clustering rule, when reviewing land use applications governed by Measure 49 orders. The Order specifically says that the approval of one additional lot and two additional dwellings is subject to the conditions of approval listed in the Order. One of those conditions is new home sites be clustered.

As explained, above, the clustering requirement does not supersede the grant of relief. There are ways to obtain one additional lot and two additional dwellings on the Luethe property. Unfortunately, the choice to divide the property is not one of those ways.

The Order is final. It requires clustering. If the Luethes believed that requirement would make it impracticable for them to build three homes on their property, the time to have challenged the requirement was when the Order was issued and subject to appellate review – not in this proceeding. To make the argument that the clustering requirement cannot be enforced is an impermissible collateral attack on DLCD's final order.

(3) *The partition clusters new parcels because it maximizes the forest values of the remnant property.*

The issue is whether new parcels are clustered. Measure 49's text shows that the purpose of clustering lots is to maximize the suitability of the remainder parcel for forest values. This does not mean, however, that new parcels that are not clustered but that possibly maximize the suitability of parcels for forest values are allowed by Measure 49.

(4) *The homes are clustered with other area properties.*

Measure 49 plainly requires that the new parcels be clustered. Other area homes are not new parcels. Placing new parcels near existing, developed parcels does not achieve compliance with Measure 49 or the Luethe Order.

(5) *Other counties allow separated home sites in resource zones.*

The hearings officer agrees. The partition plans submitted by the applicant from other jurisdictions show that other counties require that the new, two-acre parcels be clustered. They allow the home on the remnant parcel to be located away from the two-acre parcels. The Luethe order requires that "home sites" be clustered. It was unclear to this hearings officer whether this requirement means that all homes on the Luethe property need to be clustered or whether new parcels only needed to be clustered. After reviewing the text of Measure 37 and plans from other jurisdictions, it is clear that the new lots must be clustered and that the clustering requirement does not require that the home on the remnant parcel be clustered near the new parcels.

All of the plans submitted by the applicant show that my interpretation of the clustering requirement was followed in those cases but has not been followed by the Luethes. Specifically:

A. Herb Trust Property (H.7, Exhibit 2). Two new two-acre parcels are clustered with each other. The home site on the remnant property is not clustered with the new parcels.
B. Starr Property (H.7, Exhibit 3). Two new two-acre parcels are clustered with each other. The home site on the remnant property is not clustered with the new parcels.
C. Weichbrodt Property (H.7, Exhibit 4). Two new two-acre parcels are located close to each other (separated by a 45' strip). The proposed home on the remnant parcel is separated from the homes on the new parcels.

4.12 DLCD Condition #12:

If the claimants transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee or a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.

Finding: The property owners, Larry and Laura Luethe are the property owners listed in the State's Final Order. Multnomah County Assessment and Taxation records indicate that Larry and Laura Luethe are the current property owners.

4.13 DLCD Condition #13:

To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties.

Finding: As part of meeting the above requirement, the applicant has applied for land-use approval from Multnomah County through this permit. The land owner is required to also obtain building permits, sanitation permits, driveway access permits, and water resources permits.

5.00 County Applications

Multnomah County cannot approve of the Luethe applications except under the authority of and in compliance with the DLCD Final Order because the proposed land division violates the minimum lot size of the CFU-2 zoning district. As the development plan presented by the applicants violates one of the conditions of approval of the DLCD Final Order, it cannot be approved. As a result, the hearings officer has not reviewed the applicant's applications for compliance with all applicable County requirements.

6.00 Exhibits

'A' Applicant's Exhibits
'B' Finding: Exhibits
'C' Procedural Exhibits

All exhibits are available for review in Case File T3-2010-907 at the Land Use Planning office.

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
A.1	1	General Application Form	09/01/10
A.2	1	Applicant's Cover Sheet	09/01/10
A.3	10	CFU Zone Development Standards Application Form	09/01/10
A.4	11	Significant Environmental Concern for Wildlife Habitat	09/01/10
A.5	5	Hillside Development Permit Application Form (HDP Form 1)	09/01/10
A.6	64	Applicant's Narrative	09/01/10
A.7	1	Applicant's Vicinity Map	09/01/10
A.8	1	Aerial Photograph	09/01/10
A.9	1	Existing Conditions	09/01/10
A.10	1	Preliminary Plat (First Submittal)	09/01/10
A.11	1	Preliminary Site Plan and Grading and Erosion Control Plan	09/01/10
A.12	1	Parcel 1 Profiles and Details	09/01/10
A.13	1	Parcel 2 Profiles	09/01/10
A.14	3	Service Provider Forms A.14.1 – Certification of Water Service (1 page) A.14.2 – Fire District Access Review (2 pages)	09/01/10
A.15	1	Tax Map	09/01/10
A.16	9	State Measure 49 Final Order	09/01/10
A.17	1	Soils Map	09/01/10
A.18	2	Impact Analysis	09/01/10
A.19	1	Slope Analysis	09/01/10

A.20	15	County Decision T2-09-050 (Hillside Development Permit for landslide stabilization)	09/01/10
A.21	20	Geotechnical Report by GeoPacific Engineers for Parcels 1 and 2 A.21.1 – Stormwater Certificate for Parcels 1 and 2	09/01/10
A.22	22	Geotechnical Report by GeoPacific Engineers for Parcel 3. A.22.1 – Stormwater Certificate for Parcel 3	09/01/10
A.23	33	Sight Distance Certification for Easterly Access Point Prepared by MGH Associates	09/01/10
A.24	1	Home Site Clustering Map	09/01/10
A.25	1	Fire Breaks and 1995 Tax Lot 800 Grading Plan	09/01/10
A.26	8	TV&R Fire Marshal Letters	09/01/10
A.27	20	Groundwater Reports Prepared by Pacific Hydro Geology Inc.	09/01/10
A.28	40	County Decision SEC 17-97 (Significant Environmental Concern Permit Review for proposed grading and fill)	09/01/10
A.29	11	Septic System Approvals	09/01/10
A.30	9	Site Photographs	09/01/10
A.31	1	TVF&R Fire Letter of July 9, 2010	07/15/10
A.32	8	Road Rules Variance (Applicant's Narrative)	01/12/11
A.33	1	Email from Applicant Regarding Road Rules Variance Application	02/01/11
A.34	1	Revised Site Plan (2/4/2011)	02/04/11
A.35	2	Revised Site Plan (2/15/2011)	02/15/11
A.36	6	Revised Plans (03/31/2011)	03/31/11
A.37	21	**New Application** for Adjustment and Exception for Reduced Fire Safety Zone and Reduced Forest Practices Setbacks.	**04/07/11**
A.38	2	Revised Parcel 2 Plan	04/08/11
A.39	3	Email from Applicant placing 150 day clock on hold to May 13, 2011.	04/28/11
A.40	1	Email from Applicant extending hold (on 150 day clock) to June 10, 2011.	05/10/11
A.41	9	Revised Plat and Related Email String	05/23/11
A.42	8	Revised Plat and Related Email String (Current Submittal)	05/26/11
A.43	6	Revised Plans **(Current Submittal)**	**05/26/11**
'B'	#	Finding: Exhibits	Date
B.1	2	A&T Property Information for Existing Lot 700	09/02/10

B.2	2	A&T Property Information for Existing Lot 800	09/02/10
B.3	15	OAR 660.041.0000 et. Seq. (Measure 49)	09/23/10
B.4	1	Aerial with Slopes Map	03/18/11
B.5	1	Slopes Map with Contours	03/18/11
B.6	1	Aerial Soils Map	03/22/11
B.7	1	Soils Classification List	03/22/11
B.8	33	County Decision SEC HDP 9-97 (Hillside Development Permit Review for proposed grading and fill)	06/28/11
B.9	8	National Pollutant Discharge Elimination System Stormwater Discharge Permit	06/28/11
B.10	1	Applicant's Instructions for completing a Land Division	06/28/11
B.11	1	Surveyor's Instructions for completing a Land Division	06/28/11
B.12	1	Covenant Acknowledging Farm and Forest Practices	06/28/11
'C'	#	Administration & Procedures	Date
C.1	4	Incomplete Letter	10/01/10
C.2	1	Letter Deeming Application Complete	02/18/11
C.3	1	Posting Sign Receipt	03/01/11
C.4	3	Notice of Public Hearing + Mailing Labels	03/10/11
C.5	3	Corrected Notice of Public Hearing + Mailing Labels	03/16/11
C.6	2	Notice of Canceled Public Hearing + Mailing Labels	03/24/11
C.7	5	Notice of Public Hearing + Mailing Labels	04/15/11
C.8	2	Notice of Canceled Public Hearing + Mailing Labels	04/29/11
C.9	3	Notice of Public Hearing + Mailing Labels	06/15/11

Post Hearings Exhibits – Case File T3-2010-907

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
H.1	13	**H.1** Email from Matt Newman, Planning Manager, NW Engineers (on behalf of applicant) – regarding clustering. **H.1-a** Email attachment – Washington County M49 partition example. **H.1-b** Email attachment – Washington County Staff Report for M49 case. **H.1-c** Email attachment – Washington County M49 partition example. **H.1-d** Email attachment – Washington County M49 partition example.	07/12/11
H.2	2	Email from Kristian Roggendorf, applicant's attorney – request for copy of hearing notice.	07/25/11
H.3	4	Email from Sarah Mavin, Senior Planner at DLCD – regarding clustering.	07/27/11
H.4	1	Email between applicant and staff regarding staff conversation with Sarah Mavin with DLCD.	08/02/11
H.5	1	Letter from Jamey Hampton – Adjacent Property Owner to the south.	08/08/11
H.6	2	**H.6** Memo from Kevin Cook, Multnomah County Planner – regarding average lot width. **H.6-a** Example of Average Lot Width Measurement.	08/09/11
H.7	5	**H.7** Emails relating to record continuance	09/06/11
H.8	24	**H.8** Applicant's Final Argument	09/14/11