

1600 SE 190th Ave, Portland OR 97233-5910 • PH. (503) 988-3043 • Fax (503) 988-3389

DECISION OF THE HEARINGS OFFICER

Variance, Adjustment,¹ Accessory Use Determination and Significant Environmental Concern Permit

Case File: T3-2018-10469

Hearing Date, Time, and Place:

Friday, March 15, 2019, at 10:30 am, in Room 103 at the Land Use Planning Division office located at 1600 SE 190th Avenue, Portland, OR 97233

Location: 8945 NW Kaiser Road, Portland
Tax Lot 1100, Section 08B, Township: 1 North, Range: 1 West, W.M.
Alternate Account # R961080240 Property ID: R323985

Applicant: James Howsley, Jordan Ramis PC **Property Owner:** Christopher King

Summary: The applicant is requesting a Variance to the street side yard for the existing 2,338 square foot shop building (the “shop building”), an Adjustment to the street side yard for the existing tool shed, and Adjustments to the street side and rear yards for the existing warming shed, to allow these structures to remain in their present locations in the Multiple Use Agriculture-20 (MUA-20) zone. In addition, the applicant is seeking approval of a Significant Environmental Concern for wildlife habitat permit to allow the six existing accessory structures that were constructed without review to remain on the subject property. An Accessory Use Determination is required to authorize at least one of the structures.

Base Zone: Multiple Use Agriculture – 20 (MUA-20)

Overlay Zones: Significant Environmental Concern for wildlife habitat

Site Size: 1.81 acres

Applicable Approval Criteria: *Code Compliance:* MCC 37.0560

Lot of Record: MCC 33.0005 Definitions – Lot of Record, MCC 33.2870 Lot of Record.

Multiple Use Agriculture – 20: MCC 33.2820(F) Allowed Uses – Accessory Structures, MCC 2825 (J) Review Uses – Structures Customarily Accessory, MCC 33.2855(C), (D) and (G) Dimensional

¹ During the open record period the applicant modified the application to add requests for a variance to the street side setback for the existing tool shed and variances to the street side and rear yard setbacks for the existing warming shed. However, because these requests meet the lower standard for adjustments, the hearings officer reviewed these requests for compliance with the adjustment standards of MCC 33.7616.

Requirements and Development Standards

Significant Environmental Concern for wildlife habitat: MCC 33.4510 Uses; SEC Permit Required, MCC 33.4515 Exceptions, MCC 33.4570 Criteria for Approval of SEC-h Permit – Wildlife Habitat

Adjustment MCC 33.7606 Scope, 33.7616 Adjustment Approval Criteria

Variance: MCC 33.7606 Scope, MCC 33.7616 Variance Approval Criteria



Hearing Officer Decision:

The request for accessory use determination, significant environmental concern for wildlife habitat permit, adjustment, and variance are approved subject to the conditions of approval included in this Final Order.

Conditions of Approval:

1. All accessory structures/buildings shall be relocated outside of the required yards or removed from the property if and when NW Tolle Road is improved beyond the current right of way. [MCC 33.2855(C) and (D)].
2. No future or additional variances shall be granted for new structures or expansion of the existing accessory buildings below the proposed street side yard reduction to 25.2 feet.

3. Prior to land use sign off for building plan check, the property owner shall contact Code Compliance at 503.988.5508 and request a site inspection of the six non-permitted accessory buildings to verify that their use and internal improvements are in compliance with this hearings officer's approval.
 - a. Code Compliance shall verify that: the shop building only has a single toilet and a single sink; that the washer/dryer connections in the shop building have been permanently decommissioned or removed; that the loft area the shop building has been removed; and that all other accessory buildings/structures do not contain cooking facilities, toilet, bathing facilities, assembled sleeping apparatuses, or sinks. [MCC 33.2820(F)(4)(d) and MCC 33.2825(J)(2)]
 - b. Any accessory building over 200 square feet or ten feet tall shall obtain approval of a building permit and shall have said building permit made final. [MCC 33.2820(F)(1), (2), (3) and (4), MCC 37.0560].
4. Prior to land use approval for building plan check, the property owner shall fill out, sign and record the Covenant to Prohibit Residential Use of Accessory Structure document. [MCC 33.2820(F)(5)]
5. Prior to land use approval for building plan check, the property owner shall provide a lighting plan showing the existing and proposed location for all exterior lighting on all on the subject property, whether on buildings, in the landscaping, or yard. All existing lighting on the subject property shall be photographed for documentation purposes. Copies of these photographs shall be provided to Land Use Planning. All lighting, whether existing or proposed, on any of the accessory buildings being authorized by this decision shall comply with the Dark Sky Lighting Standards of MCC 33.0570.
6. Prior to land use approval for building plan check, the property owner shall provide a landscaping plan identifying all areas that contain the listed nuisance plants (Himalayan Blackberry, Poison Oak and English Holly) and any other nuisance plants from the following list. These nuisance plants shall be removed from the property by September 1, 2019, and shall be kept removed from all cleared areas on the subject property.

Scientific Name	Common Name	Scientific Name	Common Name
<i>Chelidonium majus</i>	Lesser celandine	<i>Loentodon autumnalis</i>	Fall Dandelion
<i>Cirsium arvense</i>	Canada Thistle	<i>Lythrum salicaria</i>	Purple Loosestrife
<i>Cirsium vulgare</i>	Common Thistle	<i>Myriophyllum spicatum</i>	Eurasian Watermilfoil
<i>Clematis ligusticifolia</i>	Western Clematis	<i>Phalaris arundinacea</i>	Reed Canary grass
<i>Clematis vitalba</i>	Traveler's Joy	<i>Poa annua</i>	Annual Bluegrass
<i>Conium maculatum</i>	Poison hemlock	<i>Polygonum coccineum</i>	Swamp Smartweed
<i>Convolvulus arvensis</i>	Field Morning-glory	<i>Polygonum convolvulus</i>	Climbing Binaweed
<i>Convolvulus nyctagineus</i>	Night-blooming Morning-glory	<i>Polygonum sachalinense</i>	Giant Knotweed
<i>Convolvulus sepium</i>	Lady's nightcap	<i>Prunus laurocerasus</i>	English, Portugese Laurel
<i>Cortaderia selloana</i>	Pampas grass	<i>Rhus diversiloba</i>	Poison Oak
<i>Crataegus sp. except C. douglasii</i>	hawthorn, except native species	<i>Rubus discolor</i>	Himalayan Blackberry
<i>Cytisus scoparius</i>	Scotch broom	<i>Rubus laciniatus</i>	Evergreen Blackberry
<i>Daucus carota</i>	Queen Ann's Lace	<i>Senecio jacobaea</i>	Tansy Ragwort
<i>Elodea densa</i>	South American Water-weed	<i>Solanum dulcamara</i>	Blue Bindweed
<i>Equisetum arvense</i>	Common Horsetail	<i>Solanum nigrum</i>	Garden Nightshade

Scientific Name	Common Name	Scientific Name	Common Name
<i>Equisetum telemateia</i>	Giant Horsetail	<i>Solanum sarrachoides</i>	Hairy Nightshade
<i>Erodium cicutarium</i>	Crane's Bill	<i>Taraxacum officinale</i>	Common Dandelion
<i>Geranium roberianum</i>	Robert Geranium	<i>Utricularia vulgaris</i>	Common Bladderwort
<i>Hedera helix</i>	English Ivy	<i>Urtica dioica</i>	Stinging Nettle
<i>Hypericum perforatum</i>	St. John's Wort	<i>Vinca major</i>	Periwinkle (large leaf)
<i>Ilex aquafolium</i>	English Holly	<i>Vinca minor</i>	Periwinkle (small leaf)
<i>Laburnum watereri</i>	Golden Chain Tree	<i>Xanthium spinosum</i>	Spiny Cocklebur
<i>Lemna minor</i>	Duckweed, Water Lentil	various genera	Bamboo sp.

[MCC 33.4570(B)(7)]

Dated this 24th day of April 2019



Joe Turner, Esq., AICP
Multnomah County Land Use Hearings Officer

This Decision is final when mailed. Appeals may be filed with the Oregon Land Use Board of Appeals within the time frames allowed by State law.

A. HEARING AND RECORD HIGHLIGHTS

1. Multnomah County Land Use Hearings Officer Joe Turner received testimony at the duly noticed public hearing about this application on March 8, 2019. At the hearing, the hearings officer received into the record and physically inspected the file maintained by the Department of Community Services Land Use and Transportation Planning Program regarding the application. The hearings officer made the declarations required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts and any bias or conflicts of interest.

2. County planner Lisa Estrin summarized the Staff Report and the applicable approval criteria. She submitted an aerial photo of the subject property and surrounding area (Exhibit H-1) and the applicant's written statement responding to the issues raised in the Staff Report (Exhibit H-2).

a. The accessory structures on the subject property do not qualify as nonconforming uses, as they were never legally established. Based on the 2003 aerial photo, the subject property was developed with the existing single-family residence and shop building, as well as a small accessory structure located within the treed area near the north boundary of the subject property, west of the shop. The residence and shop building are the only structures visible in the 2010 aerial photo; the small accessory structure has been removed. The property owner purchased the subject property in December 2013. Six accessory structures, including the shop building, are visible in the 2017 aerial photo. Therefore, the setback violations for the remaining accessory structures were created after the property owner acquired the subject property. There is no record of building permits for any of the six existing accessory structures on the subject property.

b. The accessory structures do not qualify as "farm buildings" that may be exempt from building permit requirements, because the subject property is not being operated as a commercial farm, subject to farm deferral. Even if the accessory structures qualified as "farm buildings," they would still be subject to setback requirements.

c. In order to approve the Accessory Use Determination the applicant must demonstrate that the accessory structures on the subject property are not designed or used as accessory dwelling and that the improvements are consistent the intended uses. The applicant must demonstrate that any uses that exceed the limited scope of accessory structures outlined in MCC 33.2820(F), i.e., the toilet, shower, and loft, are the "minimum possible departure from the Allowed Use standards to accommodate the use." MCC 33.2825(J).

d. MCC 33.2820(F)(6) limits the total square footage of accessory structures on the subject property to 2,500 square feet. The property owner will need to modify or remove one or more of the existing accessory structures to comply with this restriction. The property owner can bring the subject property into compliance with this criterion by removing the roof from the chicken pen or reducing the length of the tractor shed.

e. The applicant requested that the property owner be allowed to retain the accessory structures in their current locations until Toelle Lane is widened in the future. However, the applicant only requested a setback variance for the shop building, not the other accessory structures. Therefore, the public notice for this application did not include a setback variance request for the remaining accessory structures.

f. The size of the subject property does not support a variance to the setback requirements. The same setback requirements apply to the 80-acre EFU, 20-acre MUA-20, five acre RR, and one acre RC zones.

3. Attorney Jamie Howsley and property owner Chris King appeared in support of the application.

a. Mr. Howsley responded to the issues raised in the Staff Report.

i. The applicant is requesting setback variances for the shop building, tool shed, and warming shed on the subject property. The same analysis applies to all of three accessory buildings. Although the subject property is zoned MUA-20, which requires a minimum lot size of 20 acres, the subject property contains only 1.71 acres. The small size of the subject property limits the applicant's use of the subject property and his ability to meet setback requirements. MCC 33.285(C) requires a 30-foot setback from Toelle Lane. The existing tool shed extends one foot into the setback, measured from the existing right-of-way. With the exception of the shop building, all of the other accessory structures are setback 30 feet or more from the Toelle Lane right-of-way. However, the County is requiring a 46-foot setback, based on potential future expansion of Toelle Lane. The County is unlikely to widen Toelle Lane in the foreseeable future unless and until the subject property and surrounding area are annexed into the Urban Growth Boundary (the "UGB"). This road only serves the subject property and a few parcels to the west. Steep slopes limit opportunities to extend the road further west. The applicant would accept a condition of approval requiring that the applicant relocate the existing accessory structures if and when Toelle Lane is widened.

ii. The bathroom in the shop building is necessary to accommodate the applicant's use of the subject property. The property owner uses the shop bathroom when he is working outside in order to avoid tracking dirt into the residence. The property owner has removed the tub from the shop building. The toilet, sink, and shower remain.

iii. He requested the hearings officer hold the record open to allow the County an opportunity to provide notice of the additional setback variance requests for the warming shed and tool shed on the subject property. He agreed to toll the 150-day clock for 45 days to accommodate the open record period.

b. Mr. King submitted a floor plan for the shop building (Exhibit H-3) and summarized his use of the accessory buildings on the subject property.

i. The shop building was in existence when he purchased the property in 2003. He assumed that the shop building had been legally established. The prior owner may have intended to use the shop building as an accessory dwelling unit. However, Mr. King uses the building solely as a shop, office, and storage. Contrary to the statement on Exhibit A.21c, the building is not heated and there are no floor coverings that would facilitate residential use of the building.

ii. He uses the "workshop area" of the building for his hobbies of restoring cars and motor cycles and building bicycle frames. This area is filled with equipment, tables, benches and other items used for these activities as well as parking for vehicles that are being restored. He intends to install a solar array on the roof of the shop building and mount an eight-foot panel of electrical equipment (an "inverter") on an interior wall inside the "workshop area." He must maintain a four-foot clear area around the electrical equipment, which will reduce the usable area of this portion of the shop building.

ii. He uses the "design/layout and storage area" of the building as an office where he does CAD work and drawing related to his hobbies and business. He also uses this area for storage of car parts, woodworking equipment and other items used in his hobbies.

iii. He uses the "loft" area for "dead storage" of household and hobby items. There is limited storage area available in the shop building under existing conditions. Installation of the solar inverter will further reduce the usable area of the shop, forcing him to move some equipment out

of the shop and increasing the need for storage in the loft area of the building. This type of storage loft is common in barns and shop buildings.

iv. He uses the bathroom in the shop building to avoid tracking dirt, gravel, and grease into the house. The existing residence does not have a “mudroom” and the restrooms are located away from the entrances. He uses the shower in the shop building when he has been working in the shop or garden. He sawed up and removed the bathtub from the shop building. There is no washing machine or dryer in the shop building, although there are existing plumbing and electrical connections for this equipment. He agreed to block or remove these plumbing and electrical connections to preclude use of a washer/dryer in the shop.

v. He uses the remaining accessory structures on the subject property for farming activities as shown in Exhibit H.2. Although he does not operate a commercial farm, he has a large garden and chickens. He stores his tractors and riding lawnmower in the “warming shed.” He stores gardening equipment in the “tool shed.” He grows plants in the greenhouse and raises chickens in the coop and pen. The chicken coop and greenhouse are located entirely outside of the setback area. He located the “warming shed” and “tool shed” in the forested area near the north boundary of the subject property, partially within the setback, in order to screen views of these structures from neighboring properties. Moving these structures 46 feet from the existing Tolle Lane would eliminate this screening, increasing their visual impact on surrounding residents.

4. At the end of the public hearing, the hearings officer ordered the record held open for two weeks (until March 29, 2019) to allow the County to mail notice of the revised variance request and to allow the applicant an opportunity to submit new evidence. The hearings officer held the record held open for a third week (until April 5, 2019) to allow staff and the public an opportunity to respond to the evidence submitted during the first open record period, and for a final week (until April 12, 2019) to allow the applicant an opportunity to submit a final written argument, without any new evidence. The record in this case closed at 4:00 p.m. April 12, 2019.

B. FINDINGS OF FACT

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

1.0 PROJECT DESCRIPTION:

Hearings Officer: The applicant has requested a Variance to the required street side yard to allow the legalization of: an existing 2,338 square foot “shop” building that is located 26.2 feet from the existing right-of-way of the County road known as Toelle Lane (9.45 feet from the edge of the required 50-foot “local road” right-of-way, the “planned right-of-way”), an existing 120 square foot tool shed that is located 28.7 feet from the existing Toelle Lane right-of-way (11.95 feet from the planned right-of-way), and an existing 264 square foot “warming shed”/tractor storage building that is located 30.5 feet from the existing Toelle Lane right-of-way (13.75 feet from the planned right-of-way) and 29.8 feet from the rear property line. In addition, the applicant is seeking approval of a Significant Environmental Concern for wildlife habitat permit, as all six of the existing accessory structures on the subject property were constructed in the overlay zone without review.

2.0 PROPERTY DESCRIPTION and HISTORY :

Hearings Officer: The applicant has provided a summary of the situation for the property owner. He states *“Mr. King’s original goal was to install solar panels on his property. This remains his goal, despite the alleged nonconforming nature of the barn structure. Mr. King bought the property in its current condition – specifically, that the barn structure was already constructed as it currently exists and is located. Mr. King was unaware of the alleged nonconforming status of this structure, and desires to address this situation as appropriate with the County in order to avoid future issues and move forward with his original intent to install solar panels. Except for the removal of the structure, Mr. King is willing and open to discussing any potential options of the subject property in order to proceed with the setback variance and ultimately move forward with the intended use of his property.”*

Second, we believe there may be records within the County’s files indicating that the barn has at some point in the past been considered an agricultural exempt structure. The prior owner has informed Mr. King that he pulled a building permit, as well as electrical permits, for the barn in the late 1980s (approximately 1986) and secured an ag-exempt permit for that work. See Attachment F (Electrical Permit Applications and Attachment G (Permit Approval Sticker). There was a remodel of the house in 1994 as well, which required additional permits. Unfortunately, we cannot locate a physical copy of that ag-exempt permit. Because we believe this structure would be classified as an agricultural exempt structure, we respectfully request that County staff review the files for this property to determine whether an ag-exempt permit in fact exists.”(Exhibit A.13).

Land Use Planning staff reviewed available County records for the subject property. The existing single-family dwelling was originally constructed around 1943, prior to the County implementing zoning requirements in the area. Planning staff found the following permit records for the property:

- 1993 setback variance to allow an addition to the single-family dwelling (HV 2-94)
- August 1994 sign off for building permit for garage and bedroom addition to dwelling
- October 25, 1988 Plumbing Inspection
- HV 2-94 Case File Application Submitted November 23, 1993
- HV 2-94 Land Use Card for Variance dated November 15, 1993
- February 23, 1994 Plumbing Permit related to Single-family Dwelling
- Building Permit Sign-off Card for Garage and Bedroom Addition to Dwelling in August 1994
- 2000 Plumbing Permit for Water Heater
- 2000 Mechanical Permit for Gas Piping
- 2003 Mechanical Permit for Furnace Piping
- 2015 On-site Sewage Evaluation to Legalize Barn w/Bathroom

The subject property is 1.81 acres in size. Planning staff found no evidence of land use approval for any exempt farm structures on this property. Exempt Farm Structures are allowed on commercial farms to be used for farm purposes only. As the property is not currently in farm deferral, planning staff contacted the deferral program in Assessment and Taxation to see if the property had ever been placed in farm deferral for evidence of a commercial farm use on the property. They stated their records indicated it had not be in deferral in the past. In addition, the shop building is not being used strictly for farm purposes at present. Nonfarm uses are not permitted in an exempt farm structure. If an exempt farm structure is converted to a new use or is used for a combination of farm and non-farm uses, the applicable building and land use laws at the time of conversion are applied. Staff found no permits to convert the shop building to an accessory building for a non-farm use.

The applicant has requested that the County consider the shop building as nonconforming to present day regulations. **MCC 33.0005** Definition provides, *“Nonconforming Use - A legally established use, structure or physical improvement in existence at the time of enactment or amendment of the Zoning*

Code but not presently in compliance with the use regulations of the zoning district in which it is located. A use approved under criteria that have been modified or are no longer in effect is considered nonconforming.”

The applicant states that the former property owner constructed the building around 1986. The applicant provided a photograph of a City of Portland Bureau of Buildings Electrical Division sticker which appears to be dated from April, 1987. The issuance of an electrical or plumbing permit does not demonstrate that the building was lawfully established. In 1985 – 1986, the County transferred its building personnel to the City of Gresham and the City of Portland and ceased having its own building department. Electrical, plumbing and septic permits were issued by both agencies, without County review, through the late 80s and 90s. Without any evidence that a land use review was completed, the County cannot find that the building was constructed in compliance with all applicable laws at the time of its construction.

From October 6, 1977 to present, the property has been zoned Multiple Use Agriculture – 20 (MUA-20) (Exhibits B.4 through B.10). For the building to be a nonconforming use or structure, it must have been legally established at the time of its construction. To be legally established, the building would have needed to meet the MUA-20 yard requirements or have been granted a variance for encroachment into a required yard. Since the MUA-20 was established in September 1977, the minimum street side yard has been a minimum of 30 feet (Exhibit B.20). The building was constructed 26.2 feet from the right of way (Exhibit A.21) and therefore was not lawfully established on whatever date it was constructed in the 80s. In 1993, the prior property owner applied for a variance to construct an addition to the existing single-family dwelling. The subject property plan submitted for that land use application shows the existing dwelling, the proposed addition, and the existing driveway and parking area off of Toelle Lane (See Page 11 of this decision for building permit and HV-94 site plan). No shop building was shown on the plan. At that time, the property owner represented to the County that no other buildings existed on the property. If the shop building had been shown on the plan, the planner could have included it as part of the variance application approved in December 1993 (Exhibit B.12).

Presently, the property contains one single-family dwelling, an on-site sewage disposal system, the 2,338 square foot shop building, a 120 square foot portable tool shed, a portable chicken coop, a chicken pen with roofing, a 150 square foot greenhouse, and a 264 square foot warming shed. None of these structures have been authorized through the appropriate land use actions and permits. **MCC 33.2815 Uses** state “***No building, structure or land shall be used and no building or structure shall be hereafter erected, altered or enlarge in this district except for the uses listed in MCC 33.2820 through MCC 33.2830 when found to comply with MCC 33.2855 through 33.2885.***” The MUA-20 zone has had similar language since its adoption on September 6, 1977. While some of these buildings may not require a building permit, land use approval has and is required for them to be placed on the property.

The following photographs provide some historic context for the property over the years.

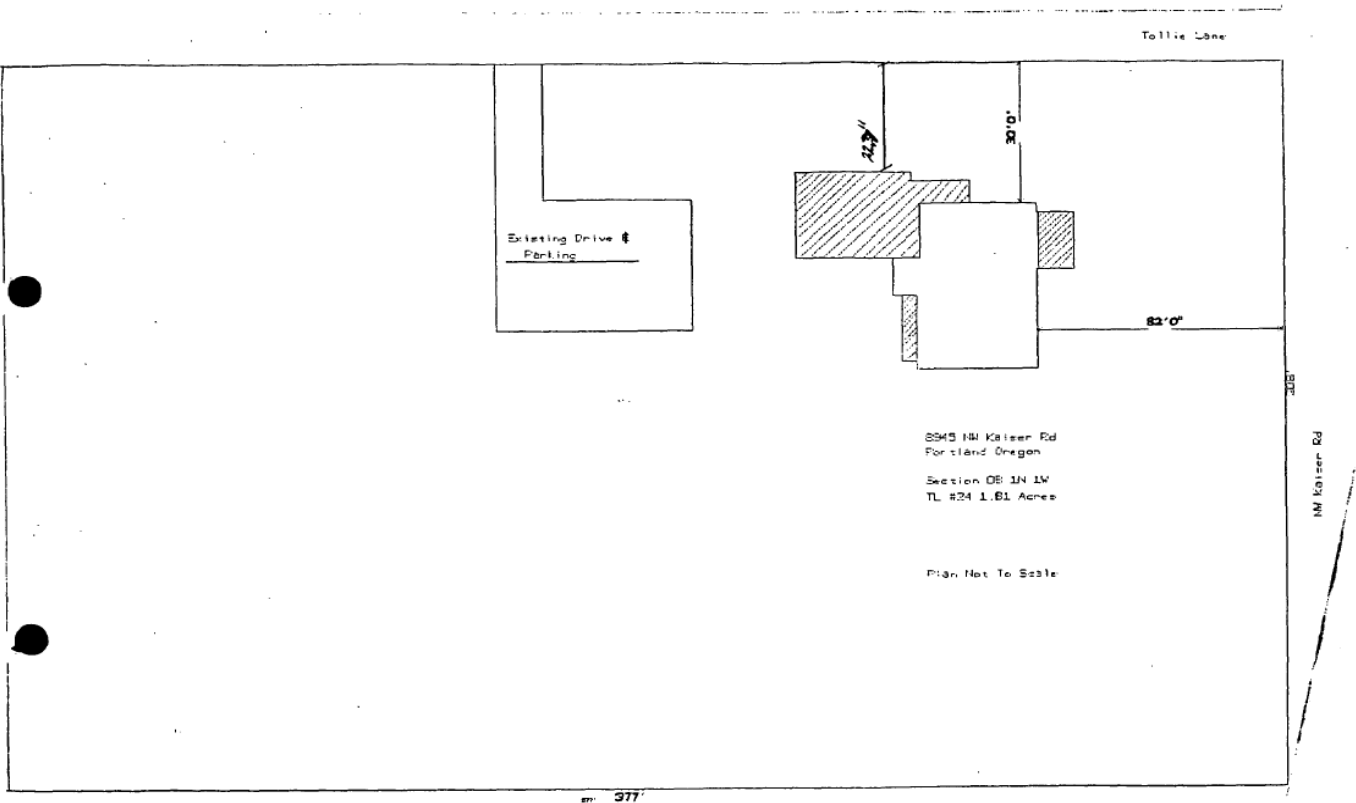
1974 Aerial of Property



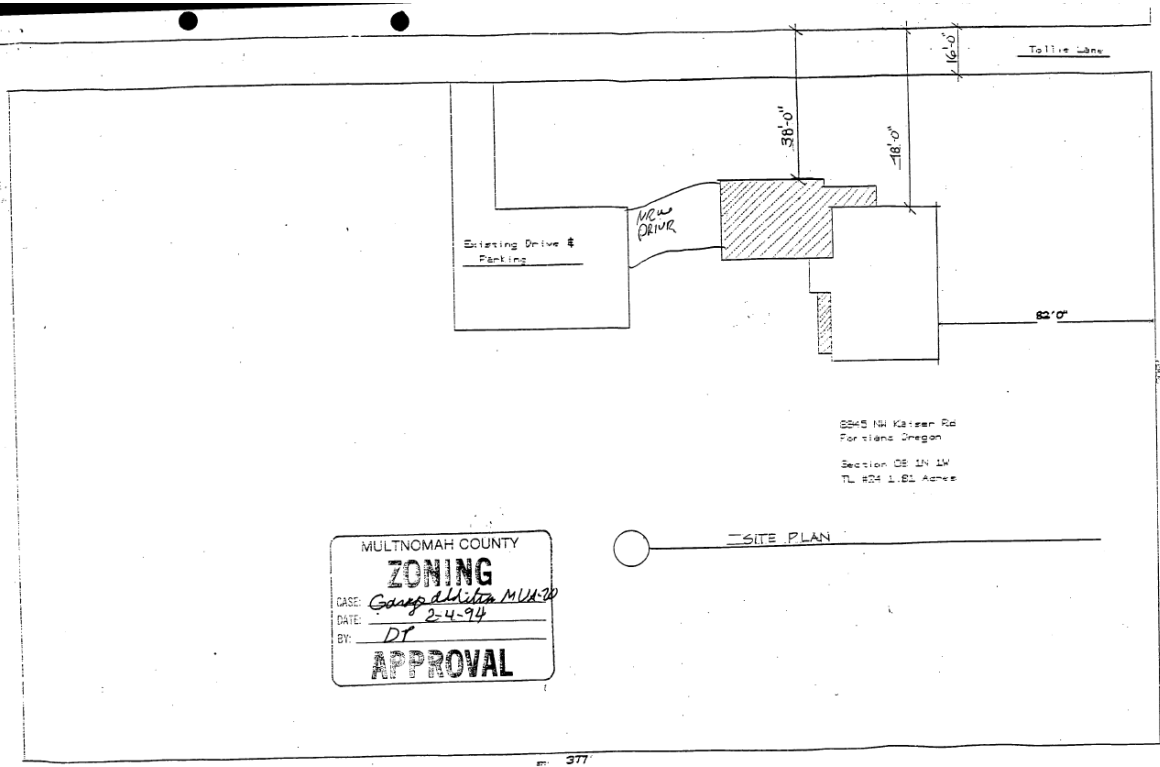
1977 Aerial Photo of Property



Site Plan from Variance Application (HV2-94)



1994 Building Permit Sign-Off



3.0 CODE COMPLIANCE

MCC 37.0560 CODE COMPLIANCE AND APPLICATIONS.

Except as provided in subsection (A), the County shall not make a land use decision approving development, including land divisions and property line adjustments, or issue a building permit 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.

Hearings Officer: Presently, the property contains one single-family dwelling, an on-site sewage disposal system, the shop building (2,338 square feet), a 120 square foot portable tool shed, a portable chicken coop, a chicken pen with roofing, a 150 square foot greenhouse, and a 264 square foot warming shed. Other than the dwelling and its septic system, none of these structures have been authorized through the appropriate land use actions and permits. The shop building is located 25.2 feet from the Toelle Lane right-of-way. The tool shed is located 28.7 feet from the Toelle Lane right-of-way. The warming shed is located 30.5 feet from the Toelle Lane right-of-way and 29.8 feet from the rear property line. The County does not distinguish between a permanent building/structure and a temporary one under the provisions of the MUA-20 zone and does not allow buildings, temporary or permanent, to encroach into required yards. There are no provisions, other than an adjustment or variance application, to allow a structure over ten square feet and over five feet in height within a side yard. None of the six existing accessory structures identified on the subject property meet the qualifications of having a less than 10 square foot footprint. These buildings need to meet the yard requirements, obtain approved adjustments of variances to the setback requirements, or be removed.

3.00 LOT OF RECORD CRITERIA:

3.01 MCC 33.0005 DEFINITIONS.

As used in this Chapter, unless the context re-quires otherwise, the following words and their derivations shall have the meanings provided below.

Lot of Record – Subject to additional provisions within each Zoning District, a Lot of Record is a parcel, lot, or a group thereof that, when created or reconfigured, (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws, or (c) complies with the criteria for the creation of new lots or parcels described in MCC 33.7785. Those laws

shall include all required zoning and land division review procedures, decisions, and conditions of approval.

- (a) “Satisfied all applicable zoning laws” shall mean: the parcel, lot, or group thereof was created and, if applicable, reconfigured in full compliance with all zoning minimum lot size, dimensional standards, and access requirements.
- (b) “Satisfied all applicable land division laws” shall mean the parcel or lot was created:
1. By a subdivision plat under the applicable subdivision requirements in effect at the time; or
 2. By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded with the Recording Section of the public office responsible for public records prior to October 19, 1978; or
 3. By a deed, or a sales contract dated and signed by the parties to the transaction, that was in recordable form prior to October 19, 1978; or
 4. By partitioning land under the applicable land partitioning requirements in effect on or after October 19, 1978; and
 5. “Satisfied all applicable land division laws” shall also mean that any subsequent boundary reconfiguration completed on or after December 28, 1993 was approved under the property line adjustment provisions of the land division code. (See Date of Creation and Existence for the effect of property line adjustments on qualifying a Lot of Record for the siting of a dwelling in the EFU and CFU districts.)
- (c) Separate Lots of Record shall be recognized and may be partitioned congruent with an “acknowledged unincorporated community” boundary which intersects a Lot of Record.

* * *

MCC 33.2870 LOT OF RECORD

- (A) In addition to the Lot of Record definition standards in MCC 33.0005, for the purposes of this district the significant dates and ordinances for verifying zoning compliance may include, but are not limited to, the following:
- (1) July 10, 1958, SR zone applied;
 - (2) July 10, 1958, F-2 zone applied;
 - (3) December 9, 1975, F-2 minimum lot size increased, Ord. 115 and 116;
 - (4) October 6, 1977, MUA-20 zone applied, Ord. 148 and 149;
 - (5) October 13, 1983, zone change from EFU to MUA-20 for some properties, Ord. 395;
 - (6) May 16, 2002, Lot of Record section amended, Ord. 982, reenacted by Ord. 997.
- (B) A Lot of Record which has less than the minimum lot size for new parcels or lots, less than the front lot line minimums required, or which does not meet the access requirement of MCC 33.2885, may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.

(C) Except as otherwise provided by MCC 33.2860, 33.2875, and 33.4300 through 33.4360, no sale or conveyance of any portion of a lot other than for a public purpose shall leave a structure on the remainder of the lot with less than minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district.

(D) The following shall not be deemed to be a Lot of Record:

- (1) An area of land described as a tax lot solely for assessment and taxation purposes;**
- (2) An area of land created by the foreclosure of a security interest.**
- (3) An area of land created by court decree.**

Hearings Officer: The subject property is known as 8945 NW Kaiser Road; also known as tax account # 1N1W08B – 01100 and is 1.81 acres in size. The applicant has provided a number of legal documents (Exhibits A.16h. through A.16p.) which describe the subject property prior to the 1950s. In 1955, the County adopted interim zoning for its jurisdiction. The applicant has also provided deeds from 1971, 1987, and 2003 showing the property remained in its original configuration (Exhibit A.16h. through p.). The subject property known as 1N1W08B – 01100 was established in its current configuration prior to zoning, hence it was lawfully created. The property is not an area of land described solely for assessment and taxation purposes and was not created by the foreclosure of a security interest or created by court decree. *The property known as 1N1W08BB – 01100 is a Lot of Record.*

4.0 MULTIPLE USE AGRICULTURE – 20 APPROVAL CRITERIA

4.1 MCC 33.2820 ALLOWED USES

(F) Accessory Structures subject to the following:

- (1) The Accessory Structure is customarily accessory or incidental to any use permitted or approved in this district and is a structure identified in the following list:**
 - (a) Garages or carports;**
 - (b) Pump houses;**
 - (c) Garden sheds;**
 - (d) Workshops;**
 - (e) Storage sheds, including shipping containers used for storage only;**
 - (f) Greenhouses;**
 - (g) Woodsheds;**
 - (h) Shelter for pets, horses or live-stock and associated buildings such as: manure storage, feed storage, tack storage, and indoor exercise area;**
 - (i) Swimming pools, pool houses, hot tubs, saunas, and associated changing rooms;**
 - (j) Sport courts;**
 - (k) Gazebos, pergolas, and detached decks;**

(l) Fences, gates, or gate support structures; and

(m) Mechanical equipment such as air conditioning units, heat pumps and electrical boxes; and

(n) Similar structures.

(2) The Accessory Structure shall not be designed or used, whether temporarily or permanently, as a primary dwelling, accessory dwelling unit, apartment, guest-house, housing rental unit, sleeping quarters or any other residential use.

(3) The Accessory Structure may contain one sink.

(4) The Accessory Structure shall not contain:

(a) More than one story;

(b) Cooking Facilities;

(c) A toilet;

(d) Bathing facilities such as a shower or bathing tub;

(e) A mattress, bed, Murphy bed, cot, or any other similar item designed to aid in sleep as a primary purpose, unless such item is disassembled for storage; or

(f) A closet built into a wall.

(5) Compliance with MCC 33.0565 is required.

(6) The combined footprints of all Accessory Buildings on a Lot of Record shall not exceed 2,500 square feet.

(7) An Accessory Structure exceeding any of the Allowed Use provisions above shall be considered through the Review Use provisions.

(8) Buildings in conjunction with farm uses as defined in ORS 215.203 are not subject to these provisions. Such buildings shall be used for their allowed farm purposes only and, unless so authorized, shall not be used, whether temporarily or permanently, as a primary dwelling, accessory dwelling unit, apartment, guest-house, housing rental unit, sleeping quarters or any other residential use.

Hearings Officer: The subject property contains six accessory structures. Based on Exhibit A.14.a and A.22, the following table lists their use, size and where they would be placed in the list above:

Identifier On Site Plan (Exhibit A.14.a)	Use	Size (Square feet)	Accessory Use
Ag Exempt Barn (Shop building)	Garden shed, workshop, storage shed, greenhouse, shelter, and possibly a garage or similar structure. (Page 2, Exhibit A.13)	Floor area: 2,338 sq. ft. Footprint: 1,960 sq. ft.	(a), (c), (d), (e), (f), (h) and (n)

Warming Shed	Tractor storage shed	264	(a)
Chicken Sled (coop)	Shelter for pets	40	(h)
Chicken Pen and Cover	Shelter for pets	150	(h)
Tool Shed	Storage shed	120	(e)
Green House	Greenhouse	150	(f)
Total Square Footage of All Accessory Structures		3,062 square feet	
Total Combined Footprint of All Accessory Buildings		2,684 square feet	

Hearings Officer: Based on the current aerial photographs of the subject property (shown below), the applicant's testimony, and the additional photographs provided in Exhibit H.2, the hearings officer finds that the warming shed, coop, chicken pen and cover, tool shed, and greenhouse are being used as accessory structures for the purposes identified on the list under MCC 33.2820(F)(1).



The shop building has two stories (first floor and loft). The first floor contains a 1,335 square foot “Workshop area” and a 630 square foot “Office/storage” area.² (Exhibits A.21c, H.2, and H.3 and King test.). The second floor loft contains 378 feet of unheated space. Based on Mr. King’s testimony, the entire shop building is unheated. The workshop area gains outside access via an

² The area labeled “Workshop area” on Exhibit H.3 is labeled “unheated” on Exhibit A.21c. The area labeled “Office/storage” on Exhibit A.21c is labeled “Design/Layout and Storage Area” on Exhibit H.3.

entry door and barn slider on the east side of the building or through the Design/Layout and Storage Area. The Design/Layout and Storage Area includes a bathroom with a shower, sink and toilet (Exhibits A.21c.), and French doors exiting the area towards the house and an entry door into the unheated area (Exhibit A.21c and H.3). The shop building also has plumbing and electrical connections for a washer and dryer. (King test.). The property owner recently removed a bathtub from the first floor bathroom area and a second sink in the Office/storage area.

The shop building must be reviewed as to whether it is "...designed or used, whether temporarily or permanently, as a primary dwelling, accessory dwelling unit, apartment, guesthouse, housing rental unit, sleeping quarters or any other residential use." This discussion occurs below in Section 4.3. *Based on the existing improvements, the building needs to be reviewed pursuant to MCC 33.2825(J).*

The applicant in Exhibits A.22 and A.23 indicates that all accessory structures except the shop building are one story and they do not contain cooking facilities, toilet, bathing facilities, or assembled sleeping apparatuses or a single sink. Exhibit H.2 includes photographs of the interiors of the structures demonstrating that the structures are one story and do not appear to contain these improvements. However, a condition of approval is warranted requiring a site inspection by code compliance to confirm these structures do not include the listed improvements. *Through a condition of approval, MCC 33.2820(F)(1), (2), (3) and (4) are met for the accessory structures other than the shop. The toilet, shower, washer/dryer connections, and second story loft in the shop building are addressed below under MCC 33.2825.*

MCC 33.2820(F)(5) requires that a covenant be recorded prior to issuance of a development permit. This is required by Condition 3. *Through a condition, this requirement can be met.*

MCC 33.2820(F)(6) and (7) specifies that for the accessory structures to be an Allowed Use, the combined footprints of all Accessory Buildings on the subject property shall not exceed 2,500 square feet. As discussed above, staff calculates the footprint of the six accessory buildings at 2,684 square feet. The hearings officer finds that the Chicken Pen and Cover structure is a "building" as defined by the Code and therefore, it is subject to the 2,500 square foot limitation. **MCC 33.0005** provides the following relevant definitions:

Accessory Building - A subordinate building, the use of which is clearly incidental to that of the main building on the same lot.

Building - Any structure used or intended for supporting or sheltering any use or occupancy.

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.

The applicant argues that the Chicken Pen and Cover structure is not a "building," it is "...simply a fenced area with a corrugated plastic cover to give the chickens a place to cover out of the mud and rain." (Exhibit A.23). However, the Chicken Pen and Cover is a structure that is used to shelter chickens; the chicken pen fencing functions as walls to support the roof structure. Therefore, it is a "building" as defined by the Code. *MCC 33.2820(F)(6) has not been met. MCC 33.2820(F)(7) requires that the accessory structures be considered through the Review Use provisions of MCC 33.2825(J).*

4.2 MCC 33.2820(F)

(8) Buildings in conjunction with farm uses as defined in ORS 215.203 are not subject to these provisions. Such buildings shall be used for their allowed farm purposes only and, unless so authorized, shall not be used, whether temporarily or permanently, as a primary dwelling, accessory dwelling unit, apartment, guesthouse, housing rental unit, sleeping quarters or any other residential use.

Hearings Officer: MCC 33.2820(F)(8) exempts ‘Buildings in conjunction with farm uses as defined in ORS 215.203...’ from the accessory structure criteria of (F)(1) through (8). No evidence exists that the subject property is used as a “farm use” as defined in ORS 215.203. To be in a farm use as defined in ORS 215.203, the applicant would need to demonstrate that the subject property is currently being employed “for the primary purpose of obtaining a profit in money...” While the property owner is raising chickens and cultivating a large garden on the subject property, there is no evidence of commercial production and the property is not subject to farm deferral. In addition, a conditional use (CU) permit to raise chickens for commercial purposes in the MUA-20 zone, and no CU permit has been issued to the subject property. *The existing accessory buildings are not exempt from the Accessory Structure codes of MCC 33.2820(F) or MCC 33.2825(J).*

4.3 MCC 33.2825 REVIEW USES

(J) Structures or uses customarily accessory or incidental to any use permitted or approved in this district, which do not meet the “accessory structures” standard in MCC 33.2820 Allowed Uses, but which meet the following provisions:

- (1) The Accessory Structure shall not be designed or used, whether temporarily or permanently, as a primary dwelling, accessory dwelling unit, apartment guesthouse, housing rental unit, sleeping quarters or any other residential use.**
- (2) The Accessory Structure shall not contain a bathing tub.**
- (3) Any toilet or bathing facilities, such as a shower, shall be located on the ground floor of any multi-story building.**
- (4) An Accessory Structure containing a toilet or bathing facilities shall not contain Cooking Facilities.**
- (5) The Accessory Structure shall not contain a mattress, bed, Murphy bed, cot, or any other similar item de-signed to aid in sleep as a primary purpose, unless such item is disassembled for storage.**
- (6) The applicant must show that building features or combined building footprints exceeding the Allowed Use provisions are the minimum possible departure from the Allowed Use standards to accommodate the use.**
- (7) Compliance with MCC 33.0565 is required.**

Hearings Officer: As discussed under Section 4.1, the applicant states that the warming shed, coop, chicken pen and cover, tool shed and green house do not contain any of the features listed in MCC 33.2825(J)(1), (2), (3), (4), or (5). The applicant submitted photographs of portions of the interiors of these structures. However, a condition of approval is warranted to verify that the structures meet these criteria.

The 2,338 square foot shop building has features that must be reviewed pursuant to MCC 33.2825(J)(1) through (5). The 1,008 square foot “Office/storage” and loft areas of the shop appear to be designed so that for ready use as a temporary or permanent guesthouse or accessory dwelling

unit. The space is unheated and the property owner recently removed the tub and second sink. However, the space is conditioned for comfortability, is dry-walled, has a full bath (toilet, sink, and shower), some counter space that can be readily expanded into a kitchen without additional permits or could be used as a kitchenette (sink, microwave, refrigerator) without modifications, plumbing and electrical connections for a washer and dryer, a carbon monoxide detector, and a French door to the exterior to allow for direct access from the parking area outside. These areas have carpet (a throw rug) and wood flooring (Exhibit A.21 and pp. 7-13 and 15 of Exhibit I.1). In addition, the “Office/storage” area is constructed over a two-foot crawlspace. The area appears readily usable and is designed as a guesthouse or accessory dwelling unit.

The hearings officer finds that the existing toilet and sink are the minimum possible departure from the Allowed Use standards to accommodate the use of the “Office/storage” portion of the shop building as an office. Although the “Office/storage” areas of the shop building are designed for use as a residence, the property owner is clearly using this space as an office and storage area. The property owner is using the “workshop” portion of the shop building as a hobby vehicle restoration shop. The hearings officer toilet and sink are necessary to facilitate the office and hobby uses, allowing the property owner to use the restroom while he is working in the office or shop without leaving the building and walking across the yard to the residence, which is located 68 feet to the east, across an uncovered driveway and parking area. Therefore, toilet and sink should be allowed to remain.

The hearings officer cannot find that a shower is the minimum possible departure from the Allowed Use standards. The property owner uses the “Workshop area” of the shop building as a hobby machine shop for rebuilding cars and motorcycles and building bicycle frames. The property owner also cultivates a large garden on the subject property. The property owner may become soiled with dirt and grease from these activities. The shower in the shop building would allow the property owner to wash off before entering his house. However, while that may be convenient, the hearings officer cannot find that it is the minimum possible departure. Many homeowners have gardens and/or work on vehicles without utilizing a secondary shower outside of the residence. There is no evidence that showers are commonly provided in most commercial machine shops or farms; employees of such facilities typically bathe at home. There is no evidence that the property owner is using or storing hazardous chemicals or other materials in the shop building that would warrant an emergency shower nor that the existing shower, located in the office portion of the building, could function as such an emergency shower. Therefore, the property owner should be required to remove the existing shower from the shop building.

In addition, the hearings officer cannot find that the loft area is the minimum possible departure from the Allowed Use standards. The loft area is a second “story” as defined by **MCC 33.0005**.³ Although the property owner is currently using the loft area for household storage (Exhibit I.1), this area is clearly designed as a separate sleeping area; with finished floor, walls, and ceiling, handrails on the stairs, and trim molding throughout. (pp. 5, 13 and 14 of Exhibit I.1). Therefore, the property owner should be required to remove the loft area and stairway from the office area of the shop building. The hearings officer understands that the property owner did not create the loft area and removal of this improvement may impose significant costs on the applicant. However, those considerations are not relevant to the approval criteria. While it may be convenient to use

³ MCC 33.0005 provides, in relevant part:

Story – That portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the top-most floor and the ceiling or roof above...

this existing space for storage, the hearings officer cannot find that it is the minimum possible departure from the Allowed Use standards. An unfinished storage loft located in the workshop portion of the site might be approvable, as it would be less susceptible to residential use. But such storage area is not currently proposed.

The applicant agreed to decommission or remove the existing plumbing and electrical connections for a washer/dryer in the office/storage portion of the shop building. A condition of approval is warranted to that effect to limit the potential for use of the office/storage portion of the shop building.

The second part of MCC 33.2825(J)(6) to be considered is regarding the combined building footprints exceeding 2,500 square feet. As described in the Table in Section 4.1 of this decision, the combined footprint of the existing accessory buildings on the subject property is 2,684 square feet. The hearings officer finds that the additional 184 square feet of accessory buildings is the minimum possible departure from the standard.

As shown in the applicant's photos, all of the existing buildings are currently being used at full capacity. (Exhibits H.2 and I.1). The chicken coop and greenhouse house plants and animals, uses that cannot be relocated into one of the other buildings on the subject property. The plants require sunlight, which is not available in the other buildings. The chickens produce waste that would conflict with existing uses in the other buildings. The warming shed is used for tractor storage. The tool shed is used for storage of gardening equipment and materials. The tractors and garden equipment stored in the warming and tool sheds could be relocated to the workshop portion of the shop building. However, as shown in Exhibit I.1, the workshop portion of the shop building is currently full to capacity with vehicles and equipment; there is no room available to accommodate the applicant's tractors and/or garden equipment inside the shop building. The planned installation of a solar inverter inside the shop building will further reduce the amount of storage available inside the shop.

Therefore, the hearings officer finds that the application has demonstrated that the additional 184 square feet of accessory building footprint is the minimum possible departure for the accessory determination.

As conditioned, the application complies with MCC 33.2820(F)(2) and MCC 33.2825(J)(1).

4.4 MCC 33.2855 DIMENSIONAL REQUIREMENTS AND DEVELOPMENT STANDARDS

(C) Minimum Yard Dimensions – Feet

Front	Side	Street Side	Rear
30	10	30	30

Maximum Structure Height – 35 feet

Minimum Front Lot Line Length – 50 feet.

* * *

(D) The minimum yard requirement shall be increased where the yard abuts a street having insufficient right-of-way width to serve the area. The county Road Official shall determine the necessary right-of-way widths based upon the county "Design and Construction Manual" and the Planning Director shall determine any additional yard requirements in consultation with the Road Official.

* * *

Hearings Officer: NW Toelle Lane is a dedicated County right-of-way that is currently 16.5 feet in width and is designated a “*Local*” roadway. The County’s “Design and Construction Manual” indicates that a “*Local*” roads should have a 50-foot wide right-of-way. Presently, Toelle Lane is significantly short of the minimum. The Transportation Division has determined that the proportional share to be dedicated in the future for the subject property if a transportation impact occurs is 16.75 feet (Exhibit B.20)

MCC 33.2855(C) requires a minimum yard of 30 feet adjacent to Toelle Lane. Pursuant to MCC 33.2855(C) and (D), the following are the new yard requirements:

Front	Side	Street Side	Rear
30 ft.	10 ft.	46.75 ft.	30 ft.

The shop building is slightly less than 25 feet from grade to peak of roof and meets the maximum height requirement. (Exhibits A.21a and H.3). Based on the photos in Exhibit H.2, all of the remaining accessory buildings are well under the maximum 35-foot height limit.

The six accessory structures on the subject property are located the following distances from the property boundaries:

Building	Front	Side	Street Side	Rear
Shop	180 ft.	142 ft.	25.2 ft.	127 ft.
Tool Shed	>180 ft.	>10 ft.	28.7 ft.	>30 ft.
Warming Shed	>180 ft.	>10 ft.	30.5 ft.	29.8 ft.
Chicken Pen and Cover	>180 ft.	> 10 ft.	>55.6 ft.	>30 ft.
Chicken Sled (Coop)	>180 ft.	>10 ft.	55.6 ft.	>30 ft.
Greenhouse	>180 ft.	>10 ft.	93 ft.	56.5 ft.

(Exhibits A.14-A.1.b, and A.21).

The Chicken coop and pen and the greenhouse comply with all applicable setback requirements. The remaining buildings comply with the side setbacks and the shop and tool shed comply with the rear setback.

The barn, tool shed, and warming shed extend into the street side setback and the warming shed extends into the rear setback. Only structures under 30 inches in height are allowed within a required yard [MCC 33.0005 Definitions, Yard]. To reduce the street setback more than 40-percent, a Variance application is required pursuant to MCC 33.7606(B). The applicant has requested a variance to the street side yard for the shop, tool shed, and warming shed. **The examiner approved a variance for the shop building and an adjustment for the tool shed and warming shed.** The variance and adjustment findings can be found in Section 5. *All of the accessory structures on the site comply with the dimensional requirements, as modified by the adjustment and variance approvals. This criterion is met.*

4.5 (G) All exterior lighting shall comply with MCC 33.0570.

Hearings Officer: The applicant provided photos of a single light fixture on the east wall of the shop building. (Exhibit H.2). However, the hearings officer cannot determine from the photos whether all exterior lighting on the site complies with the standards of MCC 33.0570. A condition of approval is warranted so that the applicant is aware of the Dark Sky Lighting Standards and can prepare the information as necessary. *Through a condition, this criterion can be met.*

5.0 Adjustment and Variance Criteria

5.1 § 33.7606 SCOPE

(A) Dimensional standards that may be modified under an Adjustment review (modified no more than 40 percent) are yards, setbacks, forest practices setbacks, buffers, minimum front lot line length, flag lot pole width, cul-de-sac length, cul-de-sac turnaround radius, and dimensions of a private street, except the following:

- (1) Reduction of resource protection set-back requirements within the Significant Environmental Concern (SEC) and Willamette River Greenway (WRG) overlay districts are prohibited. Additionally, reductions to the fire safety zones in the Commercial Forest Use zones are not allowed under the Adjustment process; and**
- (2) Reduction of yards and setback requirements within the Hillside Development overlay shall only be reviewed as a Variance; and**
- (3) Reduction of yards/setback/buffer/resource protection setback requirements within the Large Fills, Mineral Extraction, and Radio and Television Transmission Towers Code Sections and any increase to the maximum building height shall only be reviewed as Variances; and**
- (4) Minor modification of yards and set-backs in the off-street parking and design review standards are allowed only through the “exception” provisions in each respective Code section.**

Hearings Officer: The applicant has proposed a 0.6-percent (0.2-foot) reduction to the Minimum Rear Yard provision of MCC 33.2855(C) and a 35-percent (16.25-foot) reduction to the Minimum Street Side Yard provisions of MCC 33.2855(C) and (D) for the existing warming shed. The applicant also proposed a 39-percent (16.95-foot) reduction to the Minimum Street Side Yard provisions of MCC 33.2855(C) and (D) for the existing tool shed.⁴ These yard provisions are eligible for relief through an adjustment application. *Threshold has been met.*

5.2 (B) Dimensional standards that may be modified under a Variance review are yards, setbacks, forest practices setbacks, buffers, minimum front lot line length, building height, sign height, flag lot pole width, cul-de-sac length, cul-de-sac turnaround radius, and dimensions of a private street, except the following:

- (1) Reduction of resource protection setback requirements within the Significant Environmental Concern (SEC) and Willamette River Greenway (WRG) overlay districts; and**
- (2) Modification of fire safety zone standards given in Commercial Forest Use districts; and**

⁴ The applicant proposed a variance for these setback reductions. However, because the setback reductions qualify as adjustments, the hearings officer will review the reductions as adjustments. These setback reductions cannot be approved as variances, because the property owner created the need for the variances. MCC 33.7616(B).

(3) Increase to any billboard height or any other dimensional sign standard.

(C) The dimensional standards listed in (A) and (B) above are the only standards eligible for Adjustment or Variance under these provisions. Adjustments and Variances are not allowed for any other standard including, but not limited to, minimum lot area, modification of a threshold of review (e.g. cubic yards for a Large Fill), modification of a definition (e.g. 30 inches of unobstructed open space in the definition of yard), modification of an allowed density in a Planned Development or houseboat moorage, or to allow a land use that is not allowed by the Zoning District.

Hearings Officer: The applicant has requested 46-percent (21.55-foot) reduction to the Minimum Street Side Yard provision of MCC 33.2855(C) and (D) for the existing shop building. This yard provision is eligible for relief through a variance application. *Threshold has been met.*

5.3 MCC 33.7616 ADJUSTMENT APPROVAL CRITERIA

The Approval Authority may permit and authorize a modification of no more than 40 percent of the dimensional standards given in MCC 33.7606 upon finding that all the following standards in (A) through (E) are met:

(A) Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and

Hearings Officer: The dimensional requirements of MCC 33.2855 do not have a separate purpose statement. However, the hearings officer finds that the proposed adjustments will equally or better meet the purpose of the Multiple Use Agriculture District, MCC 33.2800, which includes the dimensional requirements of MCC 33.2855. The adjustments will allow the property owner to retain these structures in their existing locations, near the perimeter of the subject property, allowing the property owner to utilize the interior of the property for his existing part-time farming use. *This criterion has been met.*

5.4 (B) Any impacts resulting from the adjustment are mitigated to the extent practical. That mitigation may include, but is not limited to, such considerations as provision for adequate light and privacy to adjoining properties, adequate access, and a design that addresses the subject property topography, significant vegetation, and drainage; and

Hearings Officer: The adjustments will allow these structures to remain in their existing locations, where they are screened from off-site view by existing trees and structures on the subject property. This screening will mitigate potential visual impacts that may result from locating these structures closer to the boundaries of the subject property. *This criterion has been met.*

5.5 (C) If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zoning district; and

Hearings Officer: The applicant is requesting two adjustment; to reduce the street side and rear yard setbacks. However, the cumulative effect of the adjustments remains consistent with the purpose of the MUA-20 zone, MCC 33.2800. The warming shed extends 0.2 feet into the required 30-foot rear yard setback. This small intrusion will be imperceptible from offsite, especially given the dense vegetation between the building and the rear property line. The existing trees on the subject property will screen all of the structures from off-site view. In addition, as noted above, the adjustments will allow the property owner to retain these structures in their existing locations, near the perimeter of

the subject property, allowing the property owner to utilize the interior of the property for his existing part-time farming use. *This criterion has been met.*

- 5.6 (D) If the properties are zoned farm (EFU) or forest (CFU), the proposal will not force a significant change in, or significantly increase the cost of, accepted forestry or farming practices on the subject property and adjoining lands; and**

Hearings Officer: The subject property is not located in the EFU or CFU zones. *This criterion is inapplicable.*

- 5.7 (E) If in a Rural Residential (RR) or Burlington Rural Center (BRC) zone, the proposal will not significantly detract from the livability or appearance of the residential area.**

Hearings Officer: The subject property is not located in the RR or BRC zones. *This criterion is inapplicable.*

The proposed reductions to the street side setback for the warming shed and tool shed and the proposed reduction to the rear yard setback for the warming shed are consistent with the applicable adjustment approval criteria. Therefore, the hearings officer approves the requested adjustments.

5.8 MCC 33.7616 VARIANCE APPROVAL CRITERIA

The Approval Authority may permit and authorize a variance from the dimensional standards given in MCC 33.7606 upon finding that all the following standards in (A) through (F) are met:

(A) 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 zoning district. The circumstance or condition may relate to:

- (1) The size, shape, natural features and topography of the property, or**
- (2) The location or size of existing physical improvements on the subject property, or**
- (3) The nature of the use compared to surrounding uses, or**
- (4) The zoning requirement would substantially restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district, or**
- (5) A circumstance or condition that was not anticipated at the time the Code requirement was adopted.**
- (6) The list of examples in (1) through (5) above shall not limit the consideration of other circumstances or conditions in the application of these approval criteria.**

Hearings Officer: The subject property is 1.81 acres and located in the MUA-20 zone. It is a corner lot which requires an enlarged yard adjacent to the public right-of-way known as NW Toelle Lane. The Minimum Yard Dimensions of the MUA-20 zone are the same as those that are applicable to all base zones except the Commercial Forest Use zones. NW Toelle Lane is substantially smaller than typical substandard rights-of-way in the County and is only adjacent to three private parcels. These three parcels would bear the brunt of the required dedication in the future while providing access to the current properties using it for access. However, this street is unlikely to be improved to current standards unless and until the subject property is incorporated into the UGB. The applicant agreed to a condition of approval requiring relocation or removal of

the shop building if and when NW Tolle Lane is widened in the future. (Exhibit H.1). If this parcel was an interior lot the side yards (setbacks) would be only 10 feet and the existing shop building would exceed the side yard requirement. The subject property has a circumstance that could impact the use of the subject property. The applicant has made arguments in support of this finding in Exhibit A.3. *As conditioned, this criterion is met for the shop building.*

- 5.9 (B) The circumstance or condition in (A) above that is found to satisfy the approval criteria is not of the applicant's or present property owner's making and does not result solely from personal circumstances of the applicant or property owner. Personal circumstances include, but are not limited to, financial circumstances.**

Hearings Officer: The property owner is not responsible for the conditions discussed above. The property owner bought the property after the shop building was constructed on the property within the required street side yard. The applicant has made arguments in support of this finding in Exhibit A.3. *This criterion is met for the shop building.*

The property owner constructed the five other accessory buildings without permits after he purchased the property. Any encroachment by these buildings would be a decision made by the current owner. Therefore, the five other accessory buildings would not comply with this provision.

- 5.10 (C) There is practical difficulty or unnecessary hardship to the property owner in the application of the dimensional standard.**

Hearings Officer: It would be an unnecessary hardship to the property owner if he had to move the existing shop building, as it is a large structure that is attached to the ground; it would probably need to be disassembled to be moved. The applicant has made arguments in support of this finding in Exhibit A.3. *This criterion is met for the shop building.*

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

Hearings Officer: Authorization of the variance could be materially detrimental to the public welfare or injurious to adjacent properties, because it could limit the County's ability to widen the section of Tolle Lane abutting the subject property. However, as noted above, the applicant agreed to a condition of approval requiring relocation or removal of the shop building if and when NW Tolle Lane is widened in the future. (Exhibit H.1). Adoption of such a condition will ensure compliance with this criterion. *As conditioned, this criterion is met for the shop building.*

- 5.12 (E) The Variance requested is the minimum necessary variation from the Code requirement which would alleviate the difficulty.**

Hearings Officer: The applicant has requested a variance to the minimum street side yard for the existing shop building (Exhibit A.1, A.11 and A.13). The shop building is a large structure that is permanently attached to the ground. The building would need to be disassembled or demolished in order to move it into compliance with setback requirements. The granting of the variance for the shop building would be the minimum necessary variation which would alleviate the difficulty without modification to the shell of the building. The applicant has made arguments in support of this finding in Exhibit A.3. *This criterion is met for the shop building.*

- 5.13 (F) Any impacts resulting from the variance are mitigated to the extent practical. That mitigation may include, but is not limited to, such considerations as provision for adequate light and privacy to adjoining properties, adequate access, and a design that addresses the subject property topography, significant vegetation, and drainage.**

Hearings Officer: Approval of the variance could limit the future expansion of the NW Toelle Lane right-of-way. However, as noted above, the applicant agreed to a condition of approval requiring relocation or removal of the shop building if and when NW Tolle Lane is widened in the future. (Exhibit H.1). Adoption of such a condition will ensure compliance with this criterion. In addition, to reduce the impacts to future development of NW Toelle Lane, no future or additional variances should be granted for this shop building, its expansion or future accessory buildings below the proposed yard reduction to 25.2 feet. *As conditioned, this criterion is met for the shop building.*

6.0 Significant Environmental Concern for Wildlife Habitat

6.1 § 33.4510 USES; SEC PERMIT REQUIRED

(A) All uses permitted under the provisions of the underlying district are permitted on lands designated SEC; provided, however, that the location and design of any use, or change or alteration of a use, except as provided in MCC 33.4515, shall be subject to an SEC permit.

Hearings Officer: The entire 1.81 acre parcel is covered by the Significant Environmental Concern for wildlife habitat (SEC-h) overlay zone. A SEC-h permit is required to authorize the six accessory buildings/structures.

6.2 § 33.4515 EXCEPTIONS

(A) Except as specified in (B) below, a SEC permit shall not be required for the following:

(8) With respect to a structure lawfully established on or before January 7, 2010; alteration or expansion of such structure that:

(a) For the SEC, SEC-w, and SEC-v overlays, do not require any alteration or expansion of the exterior of the structure;

(b) For the SEC-h and SEC-s overlays, result in the alteration or expansion of 400 square feet or less of the structure's ground coverage. With respect to expansion, this exception does not apply on a project-by-project basis, but rather extends only to a maximum of 400 square feet of additional ground coverage as compared to the structure's ground cover-age on the date above; and

(c) For the SEC-h overlay, alteration or expansion of 400 square feet or less of a driveway.

Hearings Officer: As discussed in Section 3.0 above, the six accessory buildings were not lawfully established prior to 2010. The accessory buildings are not exempt from obtaining a SEC-h permit for their legalization.

6.3 MCC 33.4570 CRITERIA FOR APPROVAL OF SEC-H PERMIT -WILDLIFE HABITAT

(A) In addition to the information required by MCC 33.4520 (A), an application for development in an area designated SEC-h shall include an area map showing all properties which are adjacent to or entirely or partially within 200 feet of the proposed development, with the following information, when such information can be gathered without trespass:

(1) Location of all existing forested areas (including areas cleared pursuant to an approved forest management plan) and non-forested "cleared" areas;

For the purposes of this section, a forested area is defined as an area that has at least 75 percent crown closure, or 80 square feet of basal area per acre, of trees 11 inches DBH and larger, or an area which is being reforested pursuant to Forest Practice Rules of the Department of Forestry. A non-forested "cleared" area is defined as an area which does not meet the description of a forested area and which is not being reforested pursuant to a forest management plan.

(2) Location of existing and proposed structures;

(3) Location and width of existing and proposed public roads, private access roads, driveways, and service corridors on the subject parcel and within 200 feet of the subject parcel's boundaries on all adjacent parcels;

(4) Existing and proposed type and location of all fencing on the subject property and on adjacent properties and on properties entirely or partially within 200 feet of the subject property.

Hearings Officer: The subject property plan (Exhibit A.14a) shows the location of existing trees on the property. The subject property does contain non-forested cleared areas. The subject property plan shows the existing location of the shop building and portable accessory structures as they currently exist. The public roads adjacent to the subject property have been shown along with the existing driveway off of Toelle Lane. The only fencing identified on the property is for the Chicken Pen and Cover. *Information provided.*

6.4 (B) Development standards:

(1) Where a parcel contains any non-forested "cleared" areas, development shall only occur in these areas, except as necessary to provide access and to meet minimum clearance standards for fire safety.

Hearings Officer: The property has significant tree coverage around its perimeter on the northern, eastern and the eastern portion of the south property lines. The remainder of the subject property is non-forested. The six accessory buildings are located outside of any area which could be found to be forested. *Criterion met.*

6.5 (2) Development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the subject property.

Hearings Officer: The subject property is a corner lot adjacent to NW Kaiser Road and NW Toelle Lane. The property is 208 feet wide and 417.4 feet long. The narrow portion fronts onto NW Kaiser Road. Access is taken from NW Toelle Lane. All development on the subject property occurs within 120+/- feet of NW Toelle Lane (Exhibit A.14a.). *Criterion met.*

6.6 (3) The access road/driveway and service corridor serving the development shall not exceed 500 feet in length.

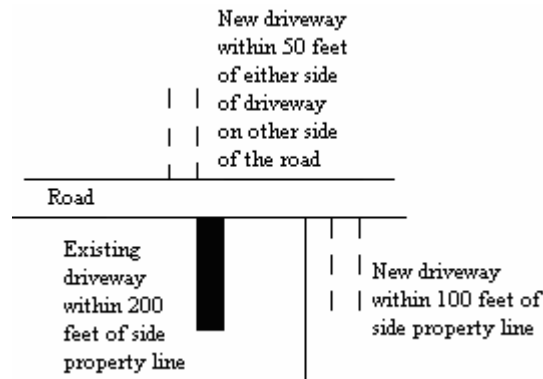
Hearings Officer: The driveway and service corridor servicing the dwelling and shop building is approximately 200 feet in length as shown on the subject property plan (Exhibit A.14a.). *Criterion met.*

6.7 (4) For the purpose of clustering access road/driveway approaches near one another, one of the following two standards shall be met:

(a) The access road/driveway approach onto a public road shall be located within 100 feet of a side property line if adjacent property on the same side of the road has an existing access road or driveway approach within 200 feet of that side property line; or

(b) The access road/driveway approach onto a public road shall be located within 50 feet of either side of an existing access road/driveway on the opposite side of the road.

(c) Diagram showing the standards in (a) and (b) above.



For illustrative purposes only.

(d) The standards in this subsection (4) may be modified upon a determination by the County Road Official that the new access road/driveway approach would result in an unsafe traffic situation using the standards in the Multnomah County “Design and Construction Manual,” adopted June 20, 2000, (or all updated versions of the manual). Standards to be used by the Road Official from the County manual include Table 2.3.2, Table 2.4.1, and additional referenced sight distance and minimum access spacing standards in the publication A Policy on Geometric Design of Highways and Streets by the American Association of State Highway and Transportation Officials (AASHTO) and the Traffic Engineering Handbook by the Institute of Transportation Engineers (ITE).

1. The modification shall be the minimum necessary to allow safe access onto the public road.

2. The County Road Official shall provide written findings supporting the modification.

Hearings Officer: The subject property fronts onto NW Kaiser Road and NW Toelle Lane. The subject property’s front lot line is adjacent to NW Kaiser Road. MCC 33.4570(B)(4)(b) states **“The access road/driveway approach onto a public road shall be located within 50 feet of either side of an existing access road/driveway on the opposite side of the road.”** The property on the opposite side of NW Kaiser Road has a driveway access onto NW Kaiser Road. By the standard under (4)(b), the driveway for the subject parcel should be located within 50 feet of either side of this driveway. The subject property accesses the public right-of-way known as NW Toelle Lane. As such, it does not comply with (4)(b).

The property, known as 8823 NW Kaiser Rd, is located to the west and behind the subject site. This adjacent parcel has a driveway that is located within approximately 153 feet of the common

property line on the same side of Toelle Lane. The subject property should be located within 100 feet of this common property line to meet the standard under MCC 33.4570(B)(4)(a). The subject property plan (Exhibit A.14a.) shows that the existing driveway onto Toelle Lane is located 188.4 feet of this common property line. *Criterion met.*

- 6.8** (5) The development shall be within 300 feet of a side property line if adjacent property has structures and developed areas within 200 feet of that common side property line.

Hearings Officer: No adjacent properties has development within 200 feet of a common side property line. *Criterion not applicable.*

- 6.9** (6) Fencing within a required setback from a public road shall meet the following criteria:

(a) Fences shall have a maximum height of 42 inches and a minimum 17 inch gap between the ground and the bottom of the fence.

(b) Wood and wire fences are permit-ted. The bottom strand of a wire fence shall be barbless. Fences may be electrified, except as prohibited by County Code.

(c) Cyclone, woven wire, and chain link fences are prohibited.

(d) Fences with a ratio of solids to voids greater than 2:1 are prohibited.

(e) Fencing standards do not apply in an area on the property bounded by a line along the public road serving the development, two lines each drawn perpendicular to the principal structure from a point 100 feet from the end of the structure on a line perpendicular to and meeting with the public road serving the development, and the front yard setback line parallel to the public road serving the development.

FIGURE 33.4570A FENCE

EXEMPTION AREA

(f) Fencing standards do not apply where needed for security of utility facilities.

Hearings Officer: The applicant indicates in Exhibit A.15a. that there is no fencing existing or proposed within the front yard adjacent to NW Kaiser Road. *Criterion Met.*

- 6.10** (7) The following nuisance plants shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property:

* * *

Hearings Officer: The applicant indicates that there are nuisance plants on the subject property (Exhibit A.15a.). However, it is unclear where the nuisance plants are located. A condition of approval is warranted requiring the property owner identify the areas of nuisance plants and set a time line for their removal. *Through a condition, this criterion can be met.*

- 6.11** (C) Wildlife Conservation Plan. An applicant shall propose a wildlife conservation plan if one of two situations exist.

(1) The applicant cannot meet the development standards of Section (B) because of physical characteristics unique to the property. The applicant must show that the

wildlife conservation plan results in the minimum departure from the standards required in order to allow the use; or

(2) The applicant can meet the development standards of Section (B), but demonstrates that the alternative conservation measures exceed the standards of Section (B) and will result in the pro-proposed development having a less detrimental impact on forested wildlife habitat than the standards in Section (B).

Hearings Officer: The subject development complies with the development standards listed in Section (B). No wildlife conservation plan is required.

7.0 Conclusion

Based on the findings, recommended conditions of approval and other information provided above, the applicant has carried the burden necessary for the approval of an Accessory Use Determination, Adjustment, Variance, and Significant Environmental Concern permit to authorize the existence of accessory buildings in the Multiple Use Agriculture – 20 zone. This approval is subject to the conditions of approval established in this Final Order.

8.00 Exhibits

‘A’ Applicant’s Exhibits

‘B’ Staff Exhibits

‘C’ Procedural Exhibits

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
A.1	1	General Application Form	5/22/2018
A.2	2	Request for Waiver of Pre-Filing/Pre-Application Meeting Requirement	5/22/2018
A.3	3	Variance Narrative	5/22/2018
A.4	1	Tax Lot Map 1N1W8B	5/22/2018
A.5	1	Colored Tax Map	5/22/2018
A.6	1	Washington County Tax Map 1N1W7 and Index	5/22/2018
A.7	1	Aerial Photograph with Six Properties Identified in Blue	5/22/2018
A.8	1	Boundary Survey 48948 for Tax Lot (7)	5/22/2018
A.9	1	Boundary Survey 57833	5/22/2018
A.10	1	NW1/4 Sec. 8 1N1W8B with tax lot blocked out in blue	5/22/2018
A.11	2	Revised General Application Form	11/09/2018
A.12	1	Cover Letter dated 11/8/2018	11/09/2018
A.13	4	Incomplete Letter Supplemental Narrative	11/09/2018
A.14	3	Attachment A – 1 page	11/09/2018

		<ul style="list-style-type: none"> a. Site Plan – 1 page b. Elevations – 1 page 	
A.15	10	<p>Attachment B – 1 page</p> <ul style="list-style-type: none"> a. Significant Environmental Concern for Wildlife Habitat Worksheet (Type I) – 7 pages b. Area Map – 8945 NW Kaiser Rd Photographic Overlay – 1 page c. Site Photo – 8945 NW Kaiser Rd – 1 page 	11/09/2018
A.16	34	<p>Attachment C – 1 page</p> <ul style="list-style-type: none"> a. Septic Review Certification – 4 page b. Fire Service Agency Review – 8 page c. Incomplete Letter from Case #T2-2015-4500 – 2 pages d. Email from Terry H to Drew DeBois - 2 pages e. Portland Maps Printout for 8945 NW Kaiser Rd – 4 pages f. Map Showing Existing Structures – 1 page g. Tax Map 1N1W8B with Subject Property Identified – 1 page h. Ownership Information from First American Title Insurance Company – 1 page i. Warranty Deed recorded at 2003-290987 on 12/12/2003 – 2 pages j. Warranty Deed recorded at Book 2049, Page 2112 on Oct. 12, 1987 – 1 page k. Warranty Deed recorded at Book 822, Page 1004 on Nov 5, 1971 – 1 page l. Contract recorded at Book 1140, Page 416 and 417 on Jan 29, 1947 – 1 page m. Warranty Deed recorded at Book 1294, Page 36 and 37 on Sept 24, 1948 – 1 page n. Contract recorded at Book 1294, Page 38 on Sept. 24, 1948 – 1 page o. Warranty Deed recorded at Book 1057, Page 497 on March 18th, 1945 – 1 page p. Book 1057, Page 495 and 496 on May 24, 1946 – 2 pages 	11/09/2018
A.17	9	<p>Attachment D – 1 page</p> <ul style="list-style-type: none"> a. Letter from Summit Engineering LLC regarding Site Visit regarding Stormwater Certificate – 2 pages b. Stormwater Certificate – 1 page c. Plan Showing Stormwater System – 1 page d. Hydrologic Soil Group Plan Showing Soils on the Property – 2 pages 	11/09/2018

		e. Hydrologic Soil Group Description – 2 pages	
A.18	11	Attachment E – 1 page a. Request for Waiver of Pre-Filing / Pre-Application Meeting Requirement – 1 page b. Copy of General Application Form – 1 page c. Responses to Variance Approval Criteria – 3 pages d. Property Highlighted in Red – 1 pages e. Aerial Photo With Properties Highlighted in Blue – 1 page f. Survey 48948 Boundary Survey – 1 page g. Survey 57833 – 1 page h. Tax Map 1N1W8B with Tax Lot 1N1W08B -00900 Highlighted – 1 page	11/09/2018
A.19	4	Attachment F – 1 page a. Electrical Permit dated April 6, 1987 – 1 page b. Electrical Permit dated December 12, 1986 – 1 page c. Electrical Permit dated October 24, 1988 – 1 page	11/09/2018
A.20	2	Attachment G – 1 page a. City of Portland Bureau of Buildings Electrical Division Approved for Service Sticker – 1 page	11/09/2018
A.21	6	Plans from T2-2015-4500 – Site Plan Code Summary a. Elevations b. Foundation Plan/Details Second Floor Framing c. Floor Plan d. Shear-Wall Plan Roof Framing e. Cross section	
A.22	3	Emails regarding Various Accessory Buildings	2.21.2019
A.23	4	Accessory Structures Questions	2.22.2019
A.24	3	Email regarding Not having Dan Olson as Hearings Officer	2.6.2019
A.25	2	Toll Letters	2.22.2019
‘B’	#	Staff Exhibits	Date
B.1	2	A&T Property Information	
B.2	1	1962 Zoning Map (F-2)	
B.3	1	10.5.1977 Zoning Map (F-2)	
B.4	1	10.6.1977 Zoning Map (MUA-20)	
B.5	1	1980 Zoning Map (MUA-20)	
B.6	1	1995 Zoning Map (MUA-20)	
B.7	1	1999 Zoning Map (MUA-20)	

B.8	1	Present Day Zoning Map for Property (MUA-20)	
B.9	1	10.25.1988 Plumbing Inspection	
B.10	24	HV 2-94 Case File Application Submitted 11.23.1993	
B.11	1	HV 2-94 Land Use Card for Variance dated 12.15.1993	
B.12	1	2.23.1994 Plumbing Permit related to Single-family Dwelling	
B.13	1	Building Permit Sign-off Card for Garage and Bedroom Addition to Dwelling in August 1994	
B.14	1	2000 Plumbing Permit for Water Heater	
B.15	1	2000 Mechanical Permit for Gas Piping	
B.16	1	2003 Mechanical Permit for Furnace Piping	
B.17	1	2015 On-site Sewage Evaluation to Legalize Barn w/Bathroom	
B.18	36	Various Years MUA-20 Zoning Codes	
B.19	4	Staff incomplete letter from 9.16.15	
B.20	2	Memo from Scott Adams, Multnomah Co Transportation Planner dated 2.27.19	
'C'	#	Administration and Procedures	Date
C.1	4	Incomplete Letter	6/19/2018
Application Complete			11/9/2018
C.2	4	Notice of Public Hearing	2.20.2019
'D'	#	Comments Received (if needed)	Date
D.1	1	Eldridge Email	2.26.2019
D.2	1	Mr. Davis Email	2.26.2019
'H'	#	Hearing Exhibits	
H.1	3	2003, 2010 & 2017 Aerial Photographs submitted by staff	3.15.2019
H.2	22	March 14, 2019 Applicant Response submitted by staff	3.15.2019
H.3	3	Plans submitted by owner	3.15.2019
H.4	1	Sign in sheet	3.15.2019
'I'	#	Post Hearing Exhibits	
I.1	21	Applicant Post-Hearing response	3.29.2019
I.2	1	Applicant Final Argument	4.12.2019