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SENT VIA EMAIL lup-submittals@multco.us

October 21, 2022

Multnomah County Land Use Hearings Officer
c/o Land Use Planning Division
1600 SE 190th Avenue
Portland, OR 97233-5910

Re: Lot of Record Verification, 16900 NW Sauvie Island Road
County Case File No. T2-2022-15447

Dear Hearings Officer:

This office represents the applicant, Patrick Maher, as his special cannabis compliance and regulatory counsel. I attended the hearing on October 7, 2022, and wish to address certain points regarding the Oregon Liquor and Cannabis Commission's ("OLCC") land use compatibility statement ("LUCS") and how that issue interacts with the current application.

Mr. Maher is the owner of EliteExtrx, LLC, which currently holds a recreational marijuana producer license at an indoor facility within Portland's city limits. In early 2020, in an effort to shift his production license from a cost and energy intensive indoor production to a more climate-conscious outdoor production, Mr. Maher entered into a lease agreement with Michael Robideau, the owner of the property which is the subject of the present application and was otherwise referred to at the hearing as Lot 1100. Mr. Maher has no lease with the owner of Lot 1200 and otherwise has no interest in developing Lot 1200.

As a current OLCC licensee, Mr. Maher is intimately familiar with the lengthy application process at OLCC, which is not considered complete until OLCC's LUCS form is properly filled out by the local city or county with land use jurisdiction. While Mr. Maher already has a license, the proposed change in location requires a new license application, along with a new LUCS. See OAR 845-025-1160(6) ("A licensee...who wishes to change the location of the licensed premises must submit a completed application for the new premises including all required forms and documents and the fee specified in OAR 845-025-1060, but does not need to submit information and fingerprints required for a criminal background check if there are no changes to the individuals listed on the initial application"); ORS 475C.053(1) ("Prior to receiving a license...an applicant shall request a land use compatibility statement from the city or county that authorizes the land use"). Thus, Mr. Maher reached out to County Planning staff to discuss his need for a LUCS and his plan to change the current use of the property as a garlic farm to a new type of crop: marijuana. See ORS 475C.489(1)(a) (Marijuana is a crop for purposes of "farm use" in ORS 215.203). As part of that process, County Planning staff directed Mr. Maher to fill out what is called a Marijuana

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Business Registration. Mr. Maher promptly filled out and returned that form, which led to staff advising him that he needed to complete a Lot of Record verification. That application turned into the application for a combined decision as to Lot 1100 and 1200 together, which Mr. Maher objected to at the time but ultimately agreed to add Lot 1200 because County Planning staff told him they would deny the application for Lot 1100 alone.

My office was retained by Mr. Maher as his special cannabis compliance and regulatory counsel on September 3, 2001. As a result, on September 8, 2022, my office submitted a LUCS form to County Planning staff for review. The form identifies Lot 1100 only as the proposed premises address. Unfortunately, the County delayed in providing either Mr. Maher or my office with payment instructions for the LUCS review fee until September 22, 2021, which was paid that same day. Later that same day, the County emailed my office a copy of the LUCS form signed by Carol R. Johnson and dated five days earlier, which indicated that the proposed land use (outdoor marijuana production) was *prohibited* in the applicable zone (EFU). I attach hereto a copy of this LUCS.

The LUCS provides a comment box with instructions to local governments as follows: “If the proposed land use is allowable only as a conditional use, permits are required as noted below.” In the box, the County provided comments that noted “[a]t present, no final land use decision has been made that tax lot ...1100 is a Lot of Record.”

On this note, I recall that at the October 7, 2022 hearing, you indicated that the propriety of the LUCS was not before you and that you weren’t sure such an appeal would even go to the Hearings Officer panel. The statute that regulates the LUCS in this context, ORS 475C.053, specifies at subsection (4) that “A city or county action concerning a land use compatibility statement under this section is not a land use decision for purposes of ORS chapter 195, 196, 197, 215 or 227.” Thus, the only avenue to appeal the County’s action on this LUCS was via a writ of review proceeding to Multnomah County Circuit Court, which EliteExtrx, LLC filed on November 15, 2021.

On December 29, 2021, the Court of Appeals issued an opinion construing ORS 475C.053¹ for the first time in *Scott, Inc. v. City of Ontario*, 316 Or App 633 (2021). In *Scott, Inc.*, the Court of Appeals clarified that the purpose of the LUCS is established by the text of ORS 475C.053(1): “to inform OLCC whether a license applicant’s proposed land use is ‘allowable as a permitted or conditional use within the given zoning designation where the land is located.’” *Id.*, at 637. The Court of Appeals further held that it is error for a city or county to go beyond that simple determination of whether the zoning of the premises is compatible or incompatible with the

¹ The statutes regulating marijuana were reorganized substantially at the end of the 2022 legislative session. In 2021, what is now ORS 475C.053 was numbered ORS 475B.063, and this is how the statute is referred to throughout the *Scott, Inc.* opinion. Despite the change in numbering, the provisions of the statute remained the same.

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proposed use by considering the unique characteristics of the premises to determine whether the proposed use satisfies other provisions of the zoning code. *Id.*, at 638 (“Nothing in the statutory scheme allows the city to go beyond that basic question—Is the proposed use prohibited, permitted, or conditionally allowed in the zone?—to decide whether a conditional use permit will be granted if the applicant applies for one. The decision whether to grant or deny a conditional use permit is a land use decision that must be made by the appropriate city officials in the legally provided manner, and, unlike the ‘Comments’ section on a LUCS, that decision is subject to review by the Land Use Board of Appeals and the appellate courts.”) (internal citations and footnote omitted).

In recognition of the fact that the County erred under the holding of *Scott, Inc.*, by checking the “prohibited” box indicating that outdoor production of marijuana is prohibited in the EFU zone (in fact, marijuana production is permitted as an allowed use – See MCC 39.8500(D), Table A and MCC 39.4220(A)), on January 6, 2022, the County filed a motion to remand the LUCS decision to the County for treatment consistent with the *Scott, Inc.* decision. Some briefing ensued as to the scope of the remand, wherein my office argued that the court should not allow the County to process the LUCS as if outdoor marijuana production on EFU land is allowable only as a conditional use because the County’s code categorizes the use as “allowed” and not conditional, and “allowed” is synonymous with “outright permitted” as that term is used in ORS 475C.053(2)(a). Conversely, the County contended that the “permitted/conditional use” dichotomy set up in ORS 475C.053 didn’t have anything to do with how those terms are used in the County’s land use code, or land use in general. Instead, the Legislature intended to create an entirely new body of law solely for this statute, and that the Legislature intended “conditional use” to mean “whenever a local permit is required.” The County went on to argue that the Lot of Record determination qualifies as a “local permit” for purposes of the statute, and that other code provisions setting forth the time, place and manner regulations for marijuana production (which are denominated in the code as use regulations rather than conditions of permit approval) made the production of a certain kind of crop, marijuana, a conditional use in EFU zones.² For this reason, the County argued, it should have the discretion that was given to the city of Ontario in *Scott, Inc.* to decide in the first instance whether to process the LUCS under ORS 475.053(2)(a) (which requires a decision within 21 days of submission) or (2)(b) (which allows the LUCS decision to be delayed until after approval of a conditional use permit). *See Scott, Inc.*, 316 Or App

² One provision of the County’s briefing as developed in this litigation is worth quoting directly:

“In particular, although ‘farm use’ is listed in a Code section entitled ‘Allowed Uses,’ the text makes clear that not all uses in that section are outright permitted: ‘The following uses and their accessory uses are allowed, *subject to all applicable supplementary regulations* contained in MCC Chapter 39.’... Marijuana production is therefore not outright permitted.”

Respondent Multnomah County’s Reply to Petitioner’s Response to Motion to Direct Withdrawal of the Local Decision and Conformance with *Scott, Inc.*, p. 10, 12-8 (January 31, 2022) (emphasis in original, citing MCC 39.4220). In the above passage, the County argues that the presence of supplementary use regulations converts a use that is denominated “allowed” from an outright permitted use to a conditional use.

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at 640 (“On remand, in a manner consistent with ORS 34.100, the city should be directed to withdraw the existing LUCS and either wait to respond to petitioner’s LUCS request until such time as petitioner obtains a conditional use permit or respond to the LUCS request in a manner consistent with our construction of ORS 475B.063 in this opinion.”).

Ultimately, the trial court determined that the issue of whether Mr. Maher’s proposed use was “outright permitted” or a “conditional use” as those terms were used in ORS 475C.053 was not properly before it and remanded the LUCS to the County for a determination in the first instance, noting that the petitioner would have rights to challenge that determination in a mandamus proceeding. The LUCS decision was officially withdrawn by court order on March 23, 2022, and remanded to the County for a determination of how to handle the LUCS as if it had been submitted anew as of that date.

The County wound up determining that it would process the LUCS pursuant to ORS 475C.053(2)(b), meaning that it will not determine whether or not the outdoor production of marijuana in the EFU zone is allowable or prohibited until after all “local permits” have been approved. We understand this Lot of Record proceeding to fall within the County’s construction of the term “local permits”, and that this proceeding is also what is holding up approval of Mr. Maher’s Marijuana Business Registration.

The County’s determination to delay the LUCS until after the resolution of this Lot of Record proceeding was challenged again in Circuit Court by way of a writ of mandamus, and that issue was heard by the court on August 18, 2022, in which the parties reiterated their respective positions summarized above. Ultimately, the trial court sustained the County’s construction, while commenting that the court itself was not well-versed in land use law and was unable to determine what the Legislature meant when it set up the outright permitted/conditional use dichotomy. The trial court’s decision is currently on appeal to the Court of Appeals.

A determination of this appeal in Mr. Maher’s favor, that Lot 1100 standing alone constitutes a Lot of Record, will hopefully move him closer to his goal of receiving a legally correct LUCS that correctly states that marijuana production on this EFU land is not prohibited. I can confidently state that the Legislature did not contemplate it taking more than a year from LUCS submission for a decision to be made on the LUCS when it enacted ORS 475C.053, and it is unclear to what end the County is delaying the inevitable.

Thank you for your time and attention to this pivotal and important matter.

Sincerely,



Kevin J. Jacoby



OREGON LIQUOR CONTROL COMMISSION REQUEST

Land Use Compatibility Statement

CITY/COUNTY USE ONLY
Date delivered by license applicant:

Received by (print):

Initial:

What is a land use compatibility statement (LUCS)? The LUCS is a form used by a state agency and local government to determine whether a land use proposal is consistent with local government's comprehensive plan and land use regulations.

Why is a LUCS required? OLCC and other state agencies with permitting or approval activities that affect land use are required by Oregon law to be consistent with local comprehensive plans and to have a process for determining consistency. Section 34(4)(a) of 2015 Oregon Laws, Chapter 614, requires OLCC to request and obtain the LUCS and have a positive LUCS prior to issuing a license.

When is a LUCS required? A LUCS is required for all proposed marijuana facilities before an OLCC license can be obtained.

How to complete a LUCS:

- Step 1: Applicant** completes Section 1 of this form and submits it to the appropriate city or county planning office. Applicant verifies with local jurisdiction whether additional forms, applications, or permits are required.
- Step 2: Local jurisdiction** completes Section 2 of this form indicating whether the proposed use is compatible with the acknowledged comprehensive plan and land use regulations and returns signed and dated form to the applicant.
 - Applicant completes payment to local jurisdiction for processing application.
 - Local jurisdictions are **NOT required to begin processing LUCS forms until January 4, 2016 at 8:30 AM.**
- Step 3: Applicant** submits this date-stamped form and any supporting information provided by the city or county to the OLCC with the license application. This form may be submitted while Section 2 is in process with the local governing body.

Section 1 – To be Completed by Applicant

**Sections marked with an asterisk should be verified with the local planning department prior to submitting this form.*

Applicant Name:	Elitextrx, LLC	Phone:	503-935-3005
Mailing Address:	5431 SE 72nd Ave	Rm/Ste:	
City:	Portland	State:	OR
		ZIP:	97206

Site plan of the subject property and proposed development attached? (*required*)

Proposed Premises Address:	16900 NW Sauvie Island Road	Rm/Ste:	
City:	Portland	County:	Multnomah
Tax Lot #*:	2N1W21 – 01100	Range/Section*:	1W W.M. / 21
Township*:	2N	Map*:	Section 21
		Latitude:	-122.829
		Longitude:	45.646

Proposed use/permit type sought (*A separate LUCS may be necessary for each proposed use even if it is on the same property*):

- Producer Wholesaler Processor Retailer Laboratory Research Certificate
Note indoor or outdoor below List endorsements below

Details of proposed use (note any attachments):
Outdoor producer. See attached Site plan.

Section 2 – To be Completed by Local Jurisdiction

Site Location:

- Inside city limits Inside UGB Outside UGB

Name of Jurisdiction:

Multnomah County Land Use Planning

Property Zoning of
Proposed Premises:

Exclusive Farm Use (EFU)

- The proposed land use has been reviewed and **is prohibited.**
 The proposed land use has been reviewed and **is not prohibited.**

If the proposed land use is allowable only as a conditional use, permits are required as noted below.

Comments:

MCC 39.4215 Uses specifies that no building, structure or land shall be used unless the use will occur on a Lot of Record. At present, no final land use decision has been made that tax lot 2N1W21-01100 is a Lot of Record.

The applicant, Elitextrx, LLC has not obtained approval of a Marijuana Business Registration from Multnomah County Land Use Planning. The County's ordinance is to protect and preserve the public health, safety and general welfare of the community by establishing restrictions on the siting and operation of Marijuana Businesses. [MCC 39.8500]

Name of Reviewing Local Official (print):

Carol R. Johnson

Title:

Planning Director

Date:

9/17/2012

Email:

carol.johnson@multco.us

Phone:

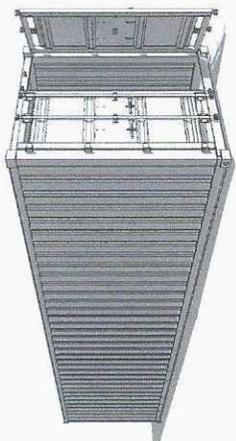
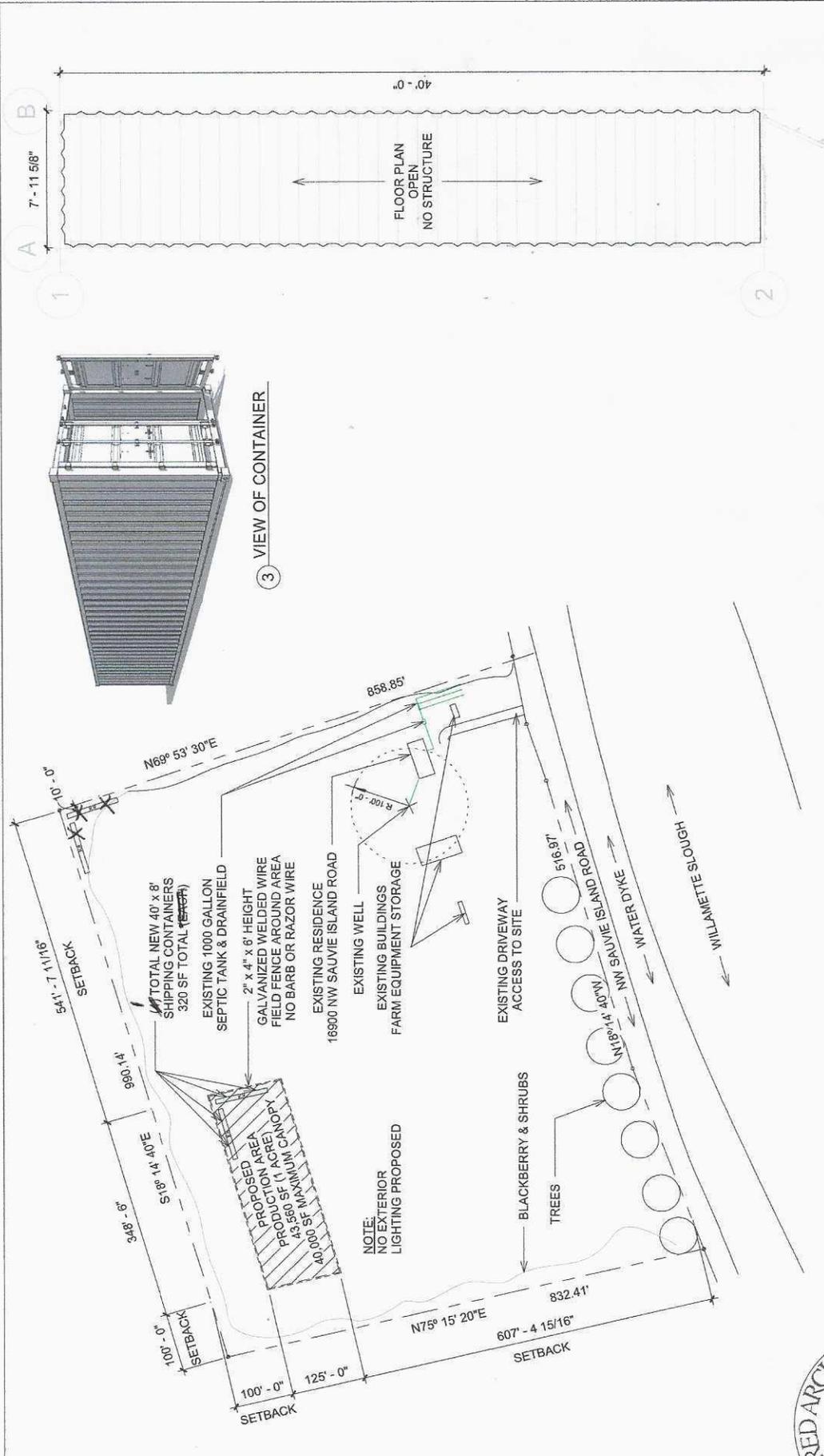
503-988-0218

Signature:

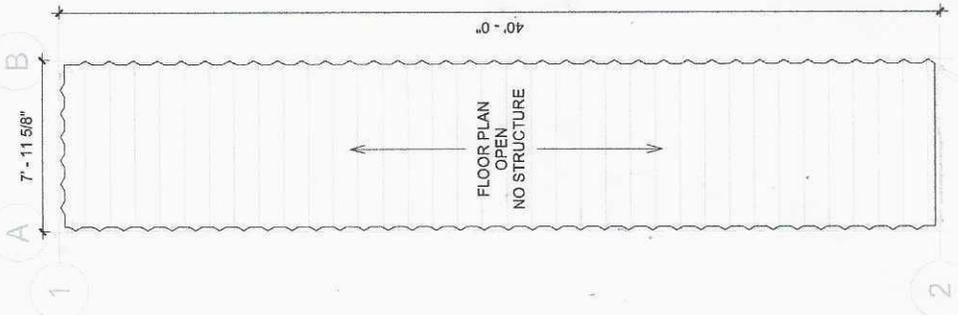


Check this box if there are attachments to this form:

REMINDER: Local jurisdictions are NOT required to begin processing LUCS forms until January 4, 2016 at 8:30 AM

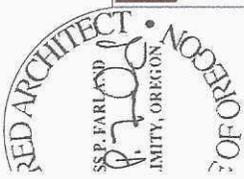


3 VIEW OF CONTAINER



2 PLAN OF CONTAINER
3/16" = 1'-0"

1 SITE PLAN
1" = 160'-0"



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