Date: September 8, 2022

To: Alan Rappelyea, Hearings Officer

From: Scott & Stacy Reed, Property Owners
12424 NW Springville Road, Portland, OR 97229

Re: Post-Hearing Memorandum
Public Hearing on Appeal of Notice of Decision (T2-2021-14981)

The purpose of this Post-Hearing Memorandum summarizes Scott and Stacy Reeds' position on the 10 remaining points of disagreement with Multnomah County Department of Community Services Land Use Planning Division ("LUP") regarding the application for the proposed farm dwelling at 12424 NW Springville Road in Portland and to address code sections identified in LUP's Post-Hearing Memorandum (dated September 2, 2022) as "Criteria not met" or "Standard not met".

The original application (August 18, 2021) addressed 73 code sections for the application for the proposed farm dwelling. The LUP Notice of Decision (June 14, 2022) claimed that 36 code sections were not met. The LUP Post-Hearing Memorandum (September 2, 2022) claims that now only 10 code sections are not met based on their review of information provided at the appeal hearing.

The 10 outstanding code sections fall into four categories- Principal Engagement in a Farm Use, Driveway Permit, Geologic Hazards Permit, and Erosion and Sediment Control Plan.

Generally

As a general matter, the criteria for a principle farm dwelling are found in OAR 660-033-0135(2), which implements the allowance for a principle farm dwellings in ORS 215.283(1)(e). The criteria established by Land Conservation and Development Commission ("LCDC") to implement the allowances in ORS 215.283(1) are exclusive; that is, the County may not add additional criteria or other restrictions not present in OAR 660-033-0135(2). This principle was clearly established in Brentmar v. Jackson County, 321 Or 481 (1995), and is explained as follows:

"In conclusion, under ORS 215.213(1) and 215.283(1), a county may not enact or apply legislative criteria of its own that supplement those found in ORS 215.213(1) and 215.283(1)." Id. at 497.

The County's assertion that the primary farm dwelling cannot be approved without prior or contemporaneous Driveway/Right-of-Way ("ROW") permits, GH permit, and ESC permits, etc. is a direct violation of Brentmar. The County is required to apply the criteria listed in the administrative rule and, if those criteria are met, approve an application for a primary farm dwelling.

This does not necessarily mean that the County cannot impose conditions requiring additional ministerial permits such as grading and erosion control, driveway/ROW access permits, etc. However, the fact that these have not been issued yet or have not been applied for is not a basis upon which the County may deny an application that otherwise meets the criteria for a primary farm dwelling. This principle and related argument extends to any criterion or standard that is in addition to those in OAR 660-033-0135(2).

Principal Engagement in a Farm Use

OAR 660-033-0135(2) requires that (F) "the dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the tract […]." The qualifying phrase "will be" demonstrates that the "principally engaged" requirement looks to the future, not the past or the present; indeed, OAR 660-033-0135(2)(G) provides that "[i]f no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by paragraph (C) of this subsection." Therefore, the administrative rule (as well as the applicable County code) provides that a farm use may be established in the future based on a condition that an applicant must demonstrate the existence of the farm use in the future.

Within this legislative context, the County's position that Mr. Reed must submit a schedule F or demonstrate that he is currently principally engaged in the farm use is wrong as a matter of law. Mr. Reed has submitted substantial evidence that demonstrates that (1) the property is being used for a farming and (2) he has attested in a signed affidavit that he is now (and will be in the future) principally engaged in farming activities on the property. He has explained that his real estate services company does not require him to work full or even half-time off the property and that he can conduct this business while still being principally engaged in the farm use.

Nothing more is required by the criteria, and even if it were, the County's position that he must prove his stated commitment with a Schedule F at this point misconstrues the burden of proof in a land use application, which is a "preponderance of the evidence." Mr. Reed has explained in detail his farm activity and how he spends the vast majority of the time engaged in that farm activity; this meets the "more likely than not" standard that the preponderance burden entails.

County staff is similarly wrong that Mr. Reed is not "principally engaged" in a farm activity because the majority of his income is derived from his real estate business. LUBA has been clear that the "principally engaged" test turns on time spent in relation to the demands of the particular farm activity, not on the amount of money earned. The best case on this language is Aplin v. Deschutes County, 69 Or LUBA 174 (2014). This case makes it clear that the "principally engaged" standard in OAR 660-033-0135 turns on the amount of time a person is capable of spending on the farming activity, not the relative percentage of income earned.

"We generally agree with petitioner that the "principally engaged" standard requires the applicant to submit, and the county to evaluate, evidence that, to the extent necessary, describes or quantifies the amount of time that the occupant of an accessory farm dwelling will be engaged in farm use of the property. Because the number of hours required on average each week for a person to be principally engaged in farm use will likely vary significantly from farm use to farm use the starting point will be to establish the average number of hours each week typically required for a full-time employee of the relevant farm use. A person "principally engaged" in that farm use must devote a similar number of hours, whether that person is also employed off the farm or not." Emphasis added.

Aplin v. Deschutes County, 69 or LUBA at 181. Any contrary definition in the County code does not control because a "dwelling in conjunction with a farm use" is permitted in EFU zones under 215.283(1)(e), subject to ORS 215.279 and LCDC's administrative rules. Under Brentmar, the County cannot add a gloss on LUBA's construction of the term "principally engaged" in ORS 660-033-0135 because a primary dwelling is a "subsection 1" farm use listed in ORS 215.283.

It is also worth noting that Aplin concerned a dwelling for a full-time long-haul truck driver who could not possibly be principally engaged in a farm activity on the property. The Reed's situation is much different. Mr. Reed has submitted substantial evidence that he is more often than not physically engaged in farming activities and intends to be so in the future, notwithstanding his remote work.

In summary, there is a preponderance of evidence in the record that Mr. Reed is now principally engaged in the ongoing farm activity. However, all Mr. Reed must demonstrate is that he will be principally engaged in a farm activity. If the Hearings Officer concludes otherwise, OAR 660-033-0135(F) and (G) allows the Reeds to prove up a farm use not yet established, and to the extent that the existence of that farm use determines their intention to be principally engaged in that farm use, such a showing can be a condition of approval.

Driveway Permit

All the NW Springville Road driveways on the farm have been in use by the farm for the last 80+ years, except the newer driveway for the proposed dwelling which was installed five years ago under Multnomah County driveway permit number 80244. The newer driveway was sited and designed by Lancaster Engineering after a traffic study and site distance evaluation was performed. The Multnomah County Transportation Division lead for the driveway permit Eileen Cunningham (503-988-3582) was called 24 hours prior and given notice of the start of construction. The driveway was then built per the approved plans (Site & Access Plan, C-401) and inspected in person by a male driving a Multnomah County Transportation Division truck. The Reeds have been using the newer driveway daily for five years. The County regularly parks road maintenance and brushing clearing equipment on the new driveway. The Reeds considered the driveway permitted and installed. Eileen Cunningham has now left the County and her replacement (Graham Martin) in the Transportation Division cannot access Eileen's notes/emails/call log from this project and he has demanded that we reapply for a permit for a driveway that has already been built and inspected.

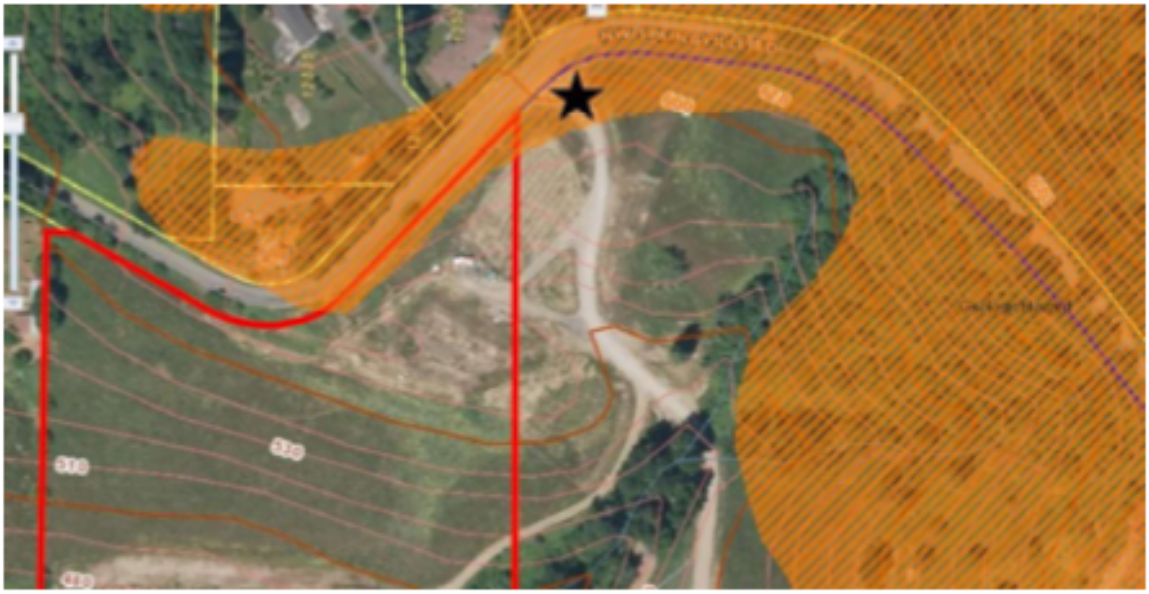
In the interest of getting LUP approval for the proposed dwelling, the Reeds applied for a driveway permit for the five-year-old driveway. Then two days before the appeal hearing (after months of review) the Transportation Division requires that the Reeds either close all the 80+ year old farm access points or apply for an Existing Non-Conforming Access or a Road Rules Variance.

Large farms, especially farms with a hilly topography, need multiple access points to manage operations and efficiently move livestock, feed, equipment, and other materials. Closing 80+ year old farm access points would make some parts of the Reed farm totally inaccessible to normal farm activities.

As noted in previous sections of this memo, the County may not deny an application for a primary farm dwelling if the criteria in OAR 660-033-0135(2) are satisfied. This is so regardless of whether the County will require a road rules variance to allow use of the proposed dwelling. Ms. Jessica Berry, Transportation and Development Manager, has stated that she would rather not wait until occupancy for this variance to be approved. However, there is no codified basis for this preference and triggering the requirement based on occupancy allow the County to approve the access points before the proposed dwelling is occupied. The problem with triggering the requirement on building permit issuance is that the County has demonstrated an inclination, even if not purposefully, of substantially delaying approval of building plans and by extension, permit issuance. Leaving to the County the ability to run the clock out on the approval for a road rules variance (even if one is required) is prejudicial to the Reeds and not necessary to ensure safe and adequate access consistent with the road rules. It is worth noting too that the County has approved the proposed access location as part of the prior principle farm dwelling (T2-2014-3377).

Geologic Hazards Permit

In the Notice of Decision (June 14, 2022), LUP Planner Chris Liu states that "as shown in the image above, a portion of the proposed development (access road/driveway) is within the mapped GH overlay." See image referenced below.



The image with the black star above is the entrance of the existing five-year-old driveway. This driveway is already built and used daily. There is no additional grading to install the driveway, although the County's ROW Department has requested "a new 20 ft wide asphalt approach to NW Springville Road". The ROW request would add approximately 1,700 square feet of asphalt paving or 10.493 yards of asphalt to the existing driveway. **The small portion of the existing driveway is the only portion of the proposed farm dwelling that is in the Geologic Hazard Overlay.**

The only potential work for this proposed dwelling that is in the Geologic Hazard Overlay is 10.493 yards of asphalt paving. Below is the County's Geologic Hazards code section (39.5070). Further below is the Exemptions (39.5080) which Section O exempts "Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces" from Geologic Hazard Permits.

5.B – GEOLOGIC HAZARDS (GH)

§ 39.5070- PURPOSES.

The purpose of this Subpart 5.B is to regulate ground disturbing activity within the Geologic Hazards Overlay in order to promote public health, safety and general welfare and to minimize the following risks potentially arising from ground disturbing activity or the establishment or replacement of impervious surfaces: public and private costs, expenses and losses; environmental harm; and human-caused erosion, sedimentation or landslides.

(Ord. 1271, Amended, 03/14/2019)

§ 39.5080 EXEMPTIONS.

Ground disturbing activity occurring in association with the following uses is exempt from GH permit requirements:

(O) Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces.
(Ord. 1271, Amended, 03/14/2019)

Further, the criteria for a primary dwelling in conjunction with a farm use based on the soil income capability test are set forth in 660-033-0135(2). As noted above, under Brentmar, the County cannot add to or further restrict the approval criteria. A Geologic Hazards Permit requirement is not an approval criterion and is not reflected in OAR 660-033-0135, and therefore cannot be used as a basis for denial.

Also, this is an application for the development of housing. Under ORS 197.307(4) and ORS 197.522(3), the County is required to apply only clear and objective standards and, where a condition is necessary to satisfy a standard, the County must consider application of a condition requiring such a Type I permit. The County need only find that compliance with such a condition is "possible." Gould v. Deschutes County, 227 Or App 601, 612, 206 P3d 1106 (2009).

The County must impose this condition in lieu of denial for these reasons.

Erosion and Sediment Control Permit

The criteria for a primary dwelling in conjunction with a farm use based on the soil income capability test are set forth in 660-033-0135(2). As noted above, under Brentmar, the County cannot add to or further restrict the approval criteria. An ESC Permit requirement is not an approval criterion and is not reflected in OAR 660-033-0135, and therefore cannot be used as a basis for denial.

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