

*File  
Copy*

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

## DECISION OF THE HEARINGS OFFICER

**An Appeal of the Denial of Applications for a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for Wildlife Habitat permit, Erosion & Sediment Control permit, and an exemption from the Geologic Hazards permit requirements.**

**Case File:** T2-2021-14981

**Applicant:** Scott Reed

**Property Owner(s)** Scott and Nancy Reed

:

**Address:** 12424 NW Springville Road, Portland Map, Tax Lot: 1N1W16D -02800, 1N1W16D -03100, 1N1W15C -00600 Alternate Account #: R961160130, R961160590, R961150770 Property ID #: R324300, R324339, R501639

**Base Zone:** Exclusive Farm Use (EFU)

**Overlay** Significant Environmental Concern for wildlife habitat (SEC-h); Significant Environmental Concern for streams (SEC-s); Geologic Hazards (GH)

Case No. T2-2021-14981

Hearings Officer Final Order

Page 1

5

Exhibit R.10

**Site Size:** 84.43 acres

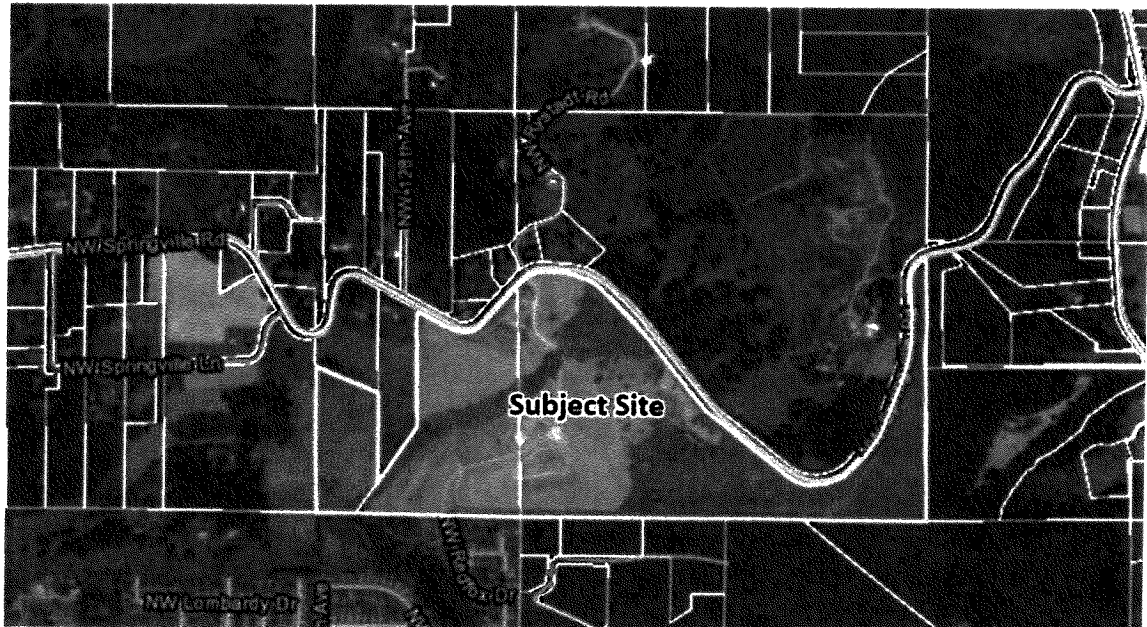
**Public Hearing:** The hearing was opened at 9:00 a.m. on August 12, 2022. The hearing was held virtually.

**Testified at the Hearing:** Carol Johnson, Planning Director, David Blankfeld, Counsels office  
Scott Reed, applicant  
Garrett Stephenson, Applicant's attorney

**Post Hearing procedures:** The record was kept open until August 26, 2022 for new evidence and then until September 2, 2022 for staff response and until September 16, 2022 for applicants final rebuttal.

**Summary:** The applicant is appealing the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that subject property qualifies for the following permits: a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for wildlife habitat, Erosion & Sediment Control, and an exemption from the Geologic Hazards permit.

**Site Description**



**Applicable Approval Criteria:**

Case No. T2-2021-14981

**General Provisions:** MCC 39.1515 Code Compliance and Applications, MCC 39.2000 Definitions, MCC 39.3005 Lot of Record Generally, MCC 39.3070 Lot of Record EFU, MCC 39.3030 Lot of Record CFU-2, MCC 39.4210 Definitions EFU, MCC 39.6235 Stormwater Drainage Control, MCC 39.6850 Dark Sky Lighting Standards

**Dwelling Customarily Provided in Conjunction with a Farm Use:** MCC 39.4225(C) Review Uses Dwelling Customarily Provided in Conjunction with a Farm Use, MCC 39.4240 Single Family Dwelling Condition of Approval, MCC 39.4245(C), (D), (F), (H) Dimensional Requirements and Development Standards, Former MCC 39.4265(B)(3) (2021), repealed by Ordinance 1304 (2022) Standards for Specified Farm Dwellings Not high-value farmland soils, capable of producing the median level of annual gross sales.

**Significant Environmental Concern (SEC-h):** MCC 39.5510 Uses; SEC Permit Required, MCC 39.5520 Application for SEC Permit, MCC 39.5580 Nuisance Plant List, MCC 39.5860 Criteria for Approval of SEC-h

**Permit Erosion and Sediment Control:** MCC 39.6210 Permits Required, MCC 39.6225 Erosion and Sediment Control Permit Geologic Hazards Exemption: MCC 39.5075 Permits Required, MCC 39.5080 Exemptions

**Geologic Hazards Exemption:** MCC 39.5075 Permits Required, MCC 39.5080 Exemptions

**DECISION:** The appeal from the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that the subject property qualifies for the following permits: a Dwelling Customarily Provided in Conjunction with a Farm Use. The Hearings Officer finds that the Appellant did not meet his burden of proof regarding farm income required by former MCC 39.4265(3)(c) as described below. The Hearings Officer addressed the remaining approval criterion that staff found was not met in order to allow Appellant to address them on appeal or to provide guidance on a new application.

The hearings officer's decision is supported by the following findings.

**Dated** this 29th day of September 2022

*Alan A. Rappleyea*

Alan A. Rappleyea  
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.

Case No. T2-2021-14981

Hearings Officer Final Order

Page 3

7

**A. HEARING AND RECORD HIGHLIGHTS**

1. Multnomah County Land Use Hearings Officer Alan Rappleyea received testimony at the duly noticed public hearing about this application on August 12, 2022. At the hearing, the hearings officer reviewed the electronic record 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 Planning Director Carol Johnson summarized the Staff Report and the applicable approval criteria. Ms. Johnson described the conundrum the County was in regarding the application and the 180-day rule under ORS 251.427(4). The Hearings Officer is very familiar with this statute and the difficulty it can impose on staff. The staff must decide what to do regarding an application based on the record after 180 days. Here, staff opted to proceed with the application based on the information they had knowing that some information was missing. Staff acknowledged that a large of amount of new information was submitted that they did not have previously. Reviewing this new information would be similar to reviewing a new application and Ms. Johnson stated that she expected that some of the new information will demonstrate compliance with some of the defects in the prior application.

3. Mr. Reed provided a very detailed description of the criteria and evidence that demonstrated that his application met those criteria. Mr. Reed expressed considerable frustration that staff did not reach out to him regarding what was lacking in his application. As stated above, the Hearings Officer is familiar with the procedural problems created by the 180-day rule and the bind it can put staff in when application materials come in late.

4. Unlike most land use hearings, the attorneys Mr. Blankfeld and Mr. Stephenson were mostly quiet and assisted on procedural issues.

5. After hearing all oral testimony, the hearings officer kept the record open as described above under "public hearing".

6. After the hearing and submittals, staff reviewed applicant's voluminous submittals and still found that criteria was not met. Mr. Reeds final submittal focused on the 10 issues that staff have with the application. This opinion will respond to the areas where the staff has found that the criteria was not met.

**B. FINDINGS OF FACT**

**FINDINGS:** See Below

The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Staff analysis and comments are identified as '**Staff:**' and address the applicable criteria. Additional findings written by the hearings officer are preceded by the words "**Hearings Officer.**" The Hearings Officer adopt all of those findings of fact in the notice of decision, Exhibit C.6 as modified by Staff memo

Exhibit J.1. where staff found the criteria is met. The remaining criteria that staff believe are not met shall be addressed with specific findings below.

### 1.00 Project Description

**Staff:** Application for Approval of a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for wildlife habitat permit, and Erosion & Sediment Control permit. The request includes an exemption from the Geologic Hazards permit requirements. According to the proposed development plans, there will be no development within the CFU-2 zoned portion of TL 600 or the area(s) within the Significant Environmental concern for streams (SEC-s) overlay.

Proposed development includes a main building of [over] approximately 11,200 sq. ft. and multiple support structures. The support structures identified in the Applicant develop plan include a water quality facility, septic system, and access road / driveway / service corridor. The proposed development plans note that the total disturbance area is 2.44 acres, with approximately 16,860 sq. ft. (0.39 acres) of new impervious surface.

### 2.00 Project History

**Staff:** The subject tract is located in rural west unincorporated Multnomah County. The majority of the subject tract is zoned Exclusive Farm Use (EFU), with a portion of TL 600 zoned Commercial Forest Use 2 (CFU-2). A stream runs northeast from the southwest portion of TL 2800 to the northwest portion of TL 600, where the stream forks. At the fork, one prong runs northeast towards NW Springville Road and the other prong runs east towards NW Springville Road. According to County Aerial Imagery (2021), the subject tract contains two large outbuildings and assorted several smaller structures.

A previous land use case (case no. T2-2014-3377) for an approval of a Customary Farm Dwelling, Significant Environmental Concern for wildlife habitat permit, and Hillside Development permit [now referred to a "Geological Hazards"(GH)] expired on September 11, 2017. Land use case no. T2-2021-14768 affirmed that case no. T2-2014-3377 expired on September 11, 201

### 3.00 Public Comment

**Staff:** Staff mailed a notice of application and invitation to comment on the proposed application to the required parties per MCC 39.1105 (Exhibit C.4). Staff received public comments, noted below, during the 14-day comment period.

**3.1 Christopher Foster,** property owner located at 15400 NW McNamee Road, submitted a letter via email on April 15, 2022 (Exhibit D.1) Staff: Foster cites two Land Use Board of Appeals engaged test. As Foster notes, one of the purposes of the principally engaged test is to distinguish between [a] dwelling occupied by those principally engaged in farm use and [a] dwelling primarily used as a rural residence. Foster states that the appellant does not appear to pass the "principally engaged test." and that the proposed building with a permit value of several million dollars, dwarfs the proposed farm use plan or purported profit return. Foster then notes that most would conclude the principal [proposed] land use is residential.

Staff addresses the approval criteria related to Foster in section 5.12.

**3.2 Scott Reed** submitted [via email] a letter from Louie Beovich, property owner located at 11525 NW Springville Road, on April 19, 2022 (Exhibit D.2) Staff: Beovich noted their support for the project. It does not correspond to any approval criteria. Comments noted.

**3.3 Joe Hazel**, property owner located at 12535 NW Springville Road, submitted an email on April 19, 2022 (Exhibit D.3) Staff: Hazel noted their support but does not correspond to any approval criteria. Comments noted.

**3.4 Scott Reed** submitted [via email] a letter from John and Linda Talbot, property owners located at 12421 NW Springville Road, on April 19, 2022 (Exhibit D.4). Staff any applicable approval criteria. Comments noted.

**3.5 Scott Reed** submitted [via email] a letter from Daniel and Judi Douglas, property owners located at 12455 NW Springville Road, on April 20, 2022 (Exhibit D.5) The Douglas' noted their approval of the project. It does not correspond to any applicable approval criteria. Comments noted.

**3.6 Carol Chesarek**, property owner located at 13300 NW Germantown Road, submitted a letter via email on April 21, 2022 (Exhibit D.6) Staff: Chesarek questioned if the applicant followed the proper procedures [for calculating annual gross sales] set forth in OAR 660-033-0135. Chesarek noted that it is unclear what indicator crops were included in the valuation, how the applicant calculated the annual gross. Chesarek also questioned the legitimacy of the egg sales claimed by the applicant, given the lack of advertisement, and licensing required for commercial sales. Chesarek disagreed that the applicant is principally engaged in a farm use due to principal employment at a development company.

Staff addresses s 5.8 5.10, and 5.12. 3.7

**Raj Chinnakonda**, community member, submitted an email on April 21, 2022 (Exhibit D.7) Case No. T2-2021-14981 Page 6 of 32 Staff: Chinnakonda provided pictures of water and soil run-off from the subject tract. They noted that the run-off has been a problem since landscaping work was conducted on the subject tract.

**3.8 Jerry Grossnickle**, chair of the Forest Park Neighborhood Association (FPNA), submitted a letter on behalf of the Forest Park Neighborhood Association via email on April 21, 2022 (Exhibit D.8) Staff: FPNA noted concerns about complying with the criteria of being "principally engaged in the farm use of the land" requirement. dwellings because the (s) have appellants have careers wholly unconnected with farming and their children are school age and so cannot be principally engaged in farming. FNPA notes that it appears that the [proposed] principal engagement with the land is developing a rural residence 215.203.

Staff addressed the approval criteria related 5.12 of this decision.

**3.9 Audrey Yoo**, community member, provided an email on April 21, 2022 (Exhibit D.9) Staff: Yoo noted their concerns with the loss of wildlife habitat that would result from approving the application.

Staff addressed the applicable approval criteria for a Significant Environmental Concern for wildlife habitat permit in sections 6.1 6.13.

**3.91 Christopher H. Foster.** Mr. Foster argues that the Applicant has yet to satisfy their burden of proof with regard to MCC 39.4265(B) (3) (f) or its underlying OAR: 660-33- 0135 (1) (c) which states the dwelling be occupied by a person "principally engaged in farm use of the land" and that the

requirement of an established “farm use” be proved. Mr. Foster attaches an article that states that Mr. Reed was involved in a large housing project in Massachusetts dated August 2022.

**Hearing Officer:** Will respond to this argument below.

**Hearing Officer:** The Hearings Officer did not receive any public comments at the hearing other than the applicant and staff testimony. The Hearings Officer attempted to contact Ms. Jesse Winterout during the hearing but was unable to establish a connection with her.

#### **4.00 Code Compliance and Applications Criteria:**

**4.1. Staff:** 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 Zoning Code and/or any permit approvals previously issued by the County. \* \* \* Staff: Public comments (Exhibit D.7) suggest potential code violations including, but not limited to, Erosion and Sediment Control requirements. In the September 8, 2021 Incomplete Letter (Exhibit C.1), staff identified potential code violations related to previous development within the Significant Environmental Concern for stream (SEC-s) overlay. However, as the County is unable to approve the requested development at this time, staff has not addressed potential code violations on the subject property.

**Hearings Officer:** The Hearing Officer finds that staff provided no further information as to whether there are any current land use violations on the property. As such, the Hearings Officer finds that this criterion is met.

#### **4.2. MCC 39.6235 STORMWATER DRAINAGE CONTROL**

- (A) Persons creating new or replacing existing impervious surfaces exceeding 500 square feet shall install a stormwater drainage system as provided in this section. This subsection (A) does not apply to shingle or roof replacement on lawful structures.
- (B) The provisions of this section are in addition to and not in lieu of any other provision of the code regulating stormwater or its drainage and other impacts and effects, including but not limited to regulation thereof in the SEC overlay.
- (C) The provisions of this section are in addition to and not in lieu of stormwater and drainage requirements in the Multnomah County Road Rules and Design and Construction Manual, including those requirements relating to impervious surfaces and proposals to discharge stormwater onto a county right-of-way.
- (D) The stormwater drainage system required in subsection (A) shall be designed to ensure that the rate of runoff for the 10-year 24- hour storm event is no greater than that which existed prior to development at the property line or point of discharge into a water body.

(E) At a minimum, to establish satisfaction of the standards in this section and all other applicable stormwater-related regulations in this code, the following information must be provided to the planning director:

(1) A site plan drawn to scale, showing the property line locations, ground topography (contours), boundaries of all ground disturbing activities, roads and driveways, existing and proposed structures and buildings, existing and proposed sanitary tank and drainfields (primary and reserve), location of stormwater disposal, trees and vegetation proposed for both removal and planting and an outline of wooded areas, water bodies and existing drywells;

(2) Documentation establishing approval of any new stormwater surcharges to a sanitary drainfield by the City of Portland Sanitarian and/or any other agency authorized to review waste disposal systems;

(3) Certified statement, and supporting information and documentation, by an Oregon licensed Professional Engineer that the proposed or existing stormwater drainage system satisfies all standards set forth in this section and all other stormwater drainage system standards in this code; and

(4) Any other report, information, plan, certification or documentation necessary to establish satisfaction of all standards set forth in this section and all other applicable stormwater-related regulations in this code, such as, but not limited to, analyses and explanations of soil characteristics, engineering solutions, and proposed stream and upland environmental protection measures.

**Staff:** According to the Stormwater Certificate, which lists Erik Esparza as the Professional Engineer (Exhibit A.23), the proposal requires the construction of an on-site storm water drainage control systems, However, Erik Esparza's signature is not included in the signature block and the applicant did not provide the supporting documents dated February 12, 2022 (signed site plan, signed storm water system details, or the stamped and signed calculations) referenced on the Stormwater Certificate. Case No. T2-2021-14981 Page 9 of 32 As noted in section 5.3 below, the applicant declined to submit a current Septic Review Certification for the proposal. The 2017 Septic Review Certification (Exhibit A.4) shows the water quality (storm water) facility in a different location. Based on the above, staff is unable to find that the proposal complies with MCC 39.6235. Criteria not met.

**Appellant:** Appellant responded to the staff statement above in its post hearing submittal.

"LUP and Chris Liu did receive signed and stamped site plans and storm water plans on February 14, 2022. This fact can be confirmed three different ways.

1. The Gmail account of Springwood Acres Farm archived an email to Chris Liu with the signed plans on February 14, 2022. The email included seven attachments. The sixth attachment was "C-



Site Plan\_2-12-2022.pdf'. See Exhibit E-Stamped & Signed Plans for a screenshot of the site plan cover page with Erik Esparza's stamp and signature (all other plan pages are stamped and signed as well).

2. The LUP has all the exhibits for this application on the link <https://www.multco.us/landuse/12424-nw-springville-road-hearing-1>. LUP Exhibit A.16 – Site and Access Plan clearly shows the stamped and signed plans.

3. In the June 14, 2022 Notice of Decision, on page 18 LUP shows a screenshot of one sheet the site plan. On the screenshot, the stamp and signature of Erik Esparza is clearly on the site plan.

In case Chris Liu needs to see these documents again, all the referenced documents have been resent to LUP via a Dropbox link along with this appeal presentation.

If signatures were missing from any plans submitted on February 14, 2022, Chris Liu should have sent the Reeds an incomplete letter within 30 days of receiving the site plans or simply asked for revised plan to be sent to him.

As noted in section 5.3 below, the applicant declined to submit a current Septic Review Certification for the proposal. The 2017 Septic Review Certification (Exhibit A.4) shows the water quality (storm water) facility in a different location.

The Reeds never “declined to submit a current Septic Review Certification.” Scott Reed asked Chris Liu over the phone and via email multiple times if LUP had reviewed the site plan. Scott Reed needed to make sure that LUP was comfortable with the site plan because the City of Portland's Bureau of Development Services requires a site plan as part of the Septic Evaluation Application. Scott Reed requested Chris Liu's feedback again on March 11, 2022 via email regarding the site plan asking, “could you look at the site plan and see if it looks good enough to send to the fire and septic folks?” Chris Liu never replied to the question. Scott Reed completed the septic application with the site plan provided to LUP. The new septic approval is included in Exhibit F-Approved Septic Plan.

All storm water documents are stamped and signed by a registered engineer (see Exhibit P-Stormwater Certification & Exhibit Q-Stormwater Calculations). A current Septic Review Certification is included in the record (see Exhibit F-Approved Septic Plan). Criteria are met.”

#### **Staff Responded:**

In section 4.3, County Staff identified the need for additional information to address portions of the Code relative to Stormwater Drainage Control. Staff amends and replaces their findings in the Decision for the following sections: Section 4.3: A current Septic Review Certification completed August 11, 2022 is included as Exhibit H.2.f. A current, signed and stamped Stormwater Certificate is included as Exhibit H.2.p. A Stamped and signed [Stormwater] calculations document is included as Exhibit H.2.q.

According to the Stormwater Certificate, which lists Erik Esparza as the Professional Engineer, the proposal requires the construction of an on-site storm water drainage control system. The Stormwater Certificate references supporting documents (signed site plan, signed storm water system details, and stamped and signed calculations) dated February 12, 2022. In Exhibit H.3, p. 6 – 7, the Applicant notes that the site plan and drainage details are included in the preliminary development plans (Exhibit H.2.o). The ‘Site and Access Plan, p. C-401’ (Exhibit H.2.o, p.9) and ‘Drainage Details, p. C-603’ are dated January 2021. Exhibit H.2.o does not contain the signed site plan or the signed storm water system details dated February 12, 2022. Based on the above, Staff is unable to find that the proposal complies with MCC 39.6235. Criteria not met.

**Appellants Final Response:** Appellant responds with two arguments.

“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.”

\*\*\*\*

“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).”

Appellant argues that the standard in the code can only be applied as conditions and not as approval criteria.

**Hearings Officer:** The Hearings Officer finds that the Appellant is correct. *Brentmar* is still good law and the County is prohibited from applying legislative criteria of its own in addition to what is found in ORS 215.213(1). LUBA recently re-affirmed this rule in *Hendrickson v. Lane County* LUBA No.2021-117 (2022). The County can apply health and safety standards. *Josephine County v. Garnier*, 987 P.2d 1263, 163 Or. App. 333 (1999). The County can impose a condition requiring a signed site plan or the signed storm water system details and ensuring that MCC 39.6235 is met.

#### **4.2: MCC 39.4245(F) On-Site Sewage.**

**Staff:** A current Septic Review certification completed August 11, 2022 is included as Exhibit H.2.f. A current, signed and stamped Stormwater Certificate is included as Exhibit H.2.p. A Stamped and signed [Stormwater] calculations document is included as Exhibit H.2.q. The Applicant still needs to provide

the February 12, 2022 signed storm water system details referenced in the Stormwater Certificate (Exhibit H.2.p). Criteria not met.”

**Hearings Officer:** For the reasons cited above concerning the application of the *Brentmar* decision, the County cannot impose this as a denial criterion. It can be imposed as a condition.

**5.00. Customary Farm Dwelling Criteria:**

**FORMER MCC 39.4265(B)(3) (2021), repealed by Ordinance 1304 (2022)**

Staff amended and replaced their findings in the Decision with the sections below. Again, the Hearings Officer’s analysis will only be for those sections where the Staff found that the criteria was not met.

**Staff:**

**“(c) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in subsection (b) of this section;”**

**“Section 5.10:** The Applicant references purported income in Exhibit H.3, pp. 20 – 21. Staff is unable to confirm the farm related income until the Applicant provides certified copies of the 2020 and 2021 Schedule F forms. Certified copies of the Schedule F forms are key documentary evidence that would serve as the basis for a finding that the standard in this section is or is not met. “

**Appellant:**

“Please refer to the response above in section 5.8 for a complete explanation regarding how the applicant conducted the study to assert the median level of annual gross sales in Table 2. The Reeds can provide the County access to past years federal income tax Schedule F, as they have done in the past for the County under separate cover. Below is a summary of 2020.

In 2020 schedule F, Springwood Acres Farm LLC produced \$44,511 of farm income from egg sales (\$43,386) and Boer goat sales (\$1,125). The total pasture raised eggs produced was 93,299 (86,769 usable, 6,530 cracked/thin shelled) resulting in 7,231 dozen eggs sold.” Exhibit H.3. Page 17

\*\*\*\*

“During the August 12, 2022 public hearing regarding the Appeal of Notice of Decision (T2-2021-14981), the Hearing Officer asked the Multnomah County LUP staff to provide a process by which Scott and Stacy Reed could submit their 2020 Schedule F income tax information to the County that it would not make private information posted to the internet. As of August 26, 2022 at 10:00 am PST the LUP staff has not communicated any submission process for the confidential tax information. The code section that is the subject of this appeal is MCC 39.4265, a “Farm Income Capable” test. Given that the

code standard is based on potential income, the proposed land use could be approved and occupancy could be conditioned on providing the 2020 Schedule F income tax information once LUP staff has figured out a secure way to transmit this information.” Exhibit I.2, page 2.

**Hearings Officer:** The Hearings Officer finds that this criterion is not met. The Appellants submittal stated that they would provide Tax form Schedule F to prove income. This has not been done. During the hearing, Appellant expressed legitimate concerns over privacy about having tax information on the web. The Hearings Officer asked staff if they could keep it off the web. Staff said “we can extract the number and keep it redacted.” They said they would keep it confidential to extent allowed under the public records laws. Appellant is incorrect as the Hearing Officer did not ask staff to develop a process. Staff never said they would get back to Appellant with a process. The Hearing Officer stated that this information was “crucial” for the decision. August 12, 2022, Hearing Tape at 1:53.

This issue was raised in the Notice of Decision, Exhibit C.6, page 15. Furthermore, staff had specifically requested “sales reports” and a Schedule F. Staff’s incomplete letter asked for:

“i. Annual Gross Sales: Your application materials did not include any supporting documents for the annual gross sales figures noted in your narrative. Please provide sales reports (i.e. monthly printouts from a payment system such as ‘Square’) and certified Schedule F form(s) from your federal tax return for the year(s) associated with the sales figures noted in your narrative. [MCC 39.4265(B)(3)(c)]” Exhibit C.1 Page 3.

In response to this letter and this section specifically, Appellant replied:

“4a(i). Annual Gross Sales- Please provide code section that requires the types of farm income information requested.” Exhibit C.3

The Hearings Officer finds that staff’s incomplete letter cited to the correct code section requiring income information. No response was needed. The only evidence in the record is the statements from Appellant found in Applicant’s Narrative Exhibit A.3, page 12. Applicant attached the findings from a previous application where staff found that the application could satisfy this criterion. Exhibit H.2.s. However, that was for a completely different type of farm use (dairy/ pigs) than proposed here so it has no relevance. Applicant states in the quote above that they have provided a Schedule F “as they have done in the past for the County under separate cover.” Unfortunately, the Hearings Officer cannot find any evidence in the record of the Schedule F or other sales report to verify the income. There is no other evidence to support the appellant’s assertion of farm income.

Staff citation *Friends of Marion County vs. Marion County* (2022) [LUBA No. 2021-088], is well taken. LUBA found that an applicant simply testifying to their [farm use] production or sales is not substantial evidence to support a conclusion affirming the farm use. Schedule F is a common tool counties use to verify income in Oregon. Here, it is not just a case of determining a “commercial farm” but there is specific dollar amounts that need to be earned. Again, the Hearing Officer stated that this

information was “crucial.” The Hearing Officer finds that the applicant did not meet his burden of proof demonstrating “annual gross sales.”

Next Appellant argues that the County can condition the demonstration of the proof of gross sales. Appellant is correct that the County Code mirrors the administrative rule.

**“(g) If 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 subsection (c) of this section.” MCC 39.4265(f)**

The Hearings Officer finds that this section is not applicable. This section is used for an applicant that has not begun a farm operation yet. Here we have an established farm use that should be able to produce definitive evidence through the submittal of its Schedule F.

**Section 5.1: “(f) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale;”**

**Staff:**

“The Applicant provided pictures of farming activities conducted on the subject property (Exhibit H.2.u). The Applicant states that they work 40 hours / week on the subject property and intend to give up “future apartments work” after moving into the requested Customary Farm Dwelling; the Applicant agrees with Staff that Stacy Reed works full-time as a dermatologist (Exhibit H.3, p. 23). An affidavit from the Applicant reiterates the Applicant’s aforementioned statements (Exhibit I.2). Additional factors that the Applicant believes serve as evidence of farming activity is that the Applicant was elected to the Multnomah County Farm bureau [a voluntary external position] and that 3.0 acres [of the 84.0 acres] will be dedicated to the residential use (Exhibit H.3, p. 24).

The Applicant relies on their testimony and pictures as the primary evidence to support a finding of their principal engagement in a farm use on the subject property. Without additional evidence, the Applicant’s testimony and pictures do not sufficiently demonstrate satisfaction of this standard. As mentioned in the Decision, documentary evidence [including certified copies of 2020 and 2021 Schedule F forms] is necessary to support a finding that the Applicant is principally engaged in a farm use of the land.

**Appellants Response:**

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 demonstrate evidence of farm 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 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.”

**Public Comment (excerpts): Chesarek, Exhibit D.6.<sup>1</sup>**

“The applicant, Scott Reed, also doesn’t appear to be currently “principally engaged in the farm use of the land”. Scott Reed’s has a company, Reed Development Partners <https://reedcommunity.com/> which is engaged in development projects all over the United States. This language doesn’t allow for someone to start principally farming the land in the future, it requires current principal engagement in the farm use of the land.

The Narrative provided by the applicant (Exhibit A.x – Narrative with Applicable Code Sections, page 12) describes the sale of eggs as the principal current farm activity (there is no value put on the sale of any goats mentioned). It says that their hens produce 40,000 eggs per year which are collected, cleaned, inspected, packaged, refrigerated, and delivered each week to residential and commercial customers.

Oregon requires egg handling licenses for commercial egg sales. I searched for egg handling licenses for the Reed property on April 20, 2022. No Oregon Department of Agriculture egg handling license shows up under Springville Road or Springwood Acres, or under the name of Reed (screenshots are attached in an endnote<sup>3</sup> . I am confused about how the Reeds can be legally selling their eggs to commercial buyers without this license.

I also couldn’t find any information advertising the Reed’s residential sales on Next Door, Facebook, Craig’s List, the TriCountyFarms or Local Harvest sites for finding fresh eggs/produce, or the Multnomah County Farm Bureau map of farm sales. There are no signs up on the periphery of the property advertising eggs for sale.

For a large scale egg operation, this appears odd and seems to undermine the argument that Scott Reed is “principally engaged in the farm use of the land” – if he was, we suspect that there would be an egg

---

<sup>1</sup> The Hearings Officer reviewed Exhibit D.2-5 letters in support of the application that did not reference any criteria.

handler's license associated with him or with his farm, and that I could figure out how to purchase some of those pasture raised eggs.

The Reeds have owned this property since 2014. If they were serious about farming, they could have established livestock and crops by now. They could have a mature orchard. The lot the home is planned for is zoned EFU. Given the size of the property, they could easily be earning enough farm income to qualify for a farm dwelling under other code sections today. Instead, they have brought in thousands of truckloads of fill (much of which was poor quality) over many years, built roads for the fill trucks, but only recently started actual farming on the property. It looks very much as if the relatively recent farming activity is simply being used to justify building an extremely large house with a view on valuable farmland, and I am concerned about whether any farming will continue after a dwelling permit has been granted by the county."

#### **Foster Exhibit D.1**

"I would like to address just one important MCC code criteria: 39.4265(B) (3) (f) or its underlying OAR: 660-33-0135 (1) (c) which states the dwelling be occupied by a person "principally engaged in farm use of the land". There are two relevant LUBA cases which establish a dual meaning of "principally engaged" that beg review in your decision making. Those cases are *Oregon Natural Desert Assoc. v. Harney County* 42 Or Luba 149 (5/14/2002) and *Alpin v Deschutes County* 69 Or Luba 174 (2014). In sum, I believe LUBA has determined the phrase means that a person must be principally engaged in farm use as opposed to some other occupation and that the land is principally engaged in farm use as opposed some other land use. I would propose that the Reed application may fail on both tests here.

In *Alpin V. Deschutes County* 69 Or Luba 174 (2014). at the second assignment of error (page 14) LUBA notes "One of the evident purposes of the principally engaged test is to distinguish between dwellings occupied by those principally engaged in farm use and dwellings primarily used as a rural residence". In *Alpin*, LUBA finds the applicant fails the test or is not principally engaged in farm use, but rather is primarily a truck driver off the farm. In the Springville Rd. case before you, we have the Reeds both holding professional positions not related to farm use. My understanding is that Mr. Reed is the principal in a development company, Reed Community Partners and the Ms. Reed operates Reed Dermatology Northwest. I also believe that their children attend school full time. It would seem apparent that the family economic livelihood and time is principally non-farm and that none of the individual occupants is likely to satisfy the test."

See also Exhibit I.1. from Mr. Foster

#### **Forest Park Neighborhood Association Exhibit D.8**

"We suggest that an application for a building permit for a farm dwelling at this site should be denied because it fails the fundamental requirement that the dwelling will be by occupied by persons "principally engaged in the farm use of the land". The applicants have careers wholly unconnected with



farming, and their children are school-aged and can thus not be “principally engaged in the farm use of the land.” Their principal engagement must surely be school work. Their parents have not indicated that they intend to abandon their own careers to become “principally engaged” in farming the land. Rather, it would appear that their principal engagement with this land is developing a rural residence. Applicants have not suggested that they intend to build such a large house with so many bedrooms for the purpose of providing accommodations for farmworkers.”

**Hearing Officer:**

The Hearings Officer finds that Appellant complies with this standard. The County correctly asked for Schedule F as evidence. The Hearings Officer disagrees with Appellant that use of this evidence is not important. Schedule F would provide excellent evidence that Appellant was “principally engaged” as a farmer. Unlike the above criteria, where proof of income is necessary, under this criterion, Appellant only needs to prove that he is making a full-time effort to farm. An applicant could be a lousy farmer with very little income to show and still qualify under this section if they were working full time on the farm (but would likely fail other criteria).

Unlike the above standard where more objective proof is needed for income, the Hearings Officer believes that “principally engaged” can be more subjective. The Hearing Officer listened to the testimony of Appellant where he stated that “he is rarely off the farm” and that he “works forty hours of week on the farm” and finds this compelling testimony. Recording at 38:13. That along with photographic evidence of his efforts and the farm operation sway the Hearings Officer to conclude that Appellant meets this criterion.

Appellant also provided a sworn statement that he would be spending forty hours a week farming. Exhibit I.2. Contrary to this testimony we have statements concerning Mr. Reed’s business concerns and Mr. Foster’s exhibit citing a press report about Mr. Reed’s business in Massachusetts. Exhibit I.1. The implication is that the development work is his primary work. Mr. Reed acknowledges that he spends 20 hours a week on his business. That business likely makes more income than the farm. As stated above income is not as crucial to this standard as is effort. No other evidence is in the record that shows Mr. Reed is not on the farm doing farm work. Admittedly, this would be hard to come by.

The Hearing Officer reviewed the *Aplin* (not Alpin) case cited above. In that case, LUBA had strong evidence that as a truck driver, the applicant was not on the property so could not be doing farm work. There is no such evidence here.

Appellant states that the County cannot ask for additional evidence to meet this standard under *Brentmar*. The Hearing Officer disagrees and this evidence is directed to the statutory standard and does not add any additional criteria.

Ms. Chesarek raised concerns about the Appellant not have an egg handlers license. Appellant has submitted that into the record. Ms. Chesarek believes if the Appellant was farming, there would be more to show on the property. The Hearings Officer finds that Appellant just needs to show he is principally engaged in farming and does not have to prove that he is farming in the most profitable way.

Mr. Foster commented that the size of the dwelling is evidence that the Appellant is mainly using it for rural residential and not farming. As stated at the Hearing, the Hearings Officer does not believe the size of the dwelling is relevant to this criterion. Again, it is only the amount of labor that the Appellant puts for to determine whether he is principally engaged in farming.

This is a close matter, but the Hearing Officer believes Appellant has met his burden of proof and meets this criterion.

**Section 6.00 (B)(22):**

**Staff:**

“The August 10, 2022 Memorandum from the County Right-of-Way office regarding the Applicant’s request for a Transportation Planning review (Exhibit H.1, p.5 – 36), notes that additional information is needed to determine if the project creates a transportation impact (Exhibit H.1, p.6, Requirement no.3 and Exhibit H.1, p.14). Until the Applicant provides the County Right-of-Way office with the information needed to complete the Transportation Planning Review, and a completed Transportation Planning Review is available, staff is unable to find that this standard is met.”

Staff also submitted a memo from Jessica Berry, Transportation Planning & Development Manager Carol Johnson, Land Use Planning Director. Exhibit J.2

**Appellant:**

“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)."

#### **Hearings Officer:**

As discussed above, the County cannot include additional approval criteria on farm uses under *Brentmar*. However, the County can impose conditions that do not address farming or farm approval criteria but address health and safety concerns. The Hearing Officer finds that the conditions regarding access do not address farming but are to protect the traveling public and maintain the safe functioning of County roads.

"We do not read *Brentmar* to insulate uses described in ORS 215.213(1) and ORS 215.283(1) from all state and local government safety regulations. Simply because a school is located in an area zoned for exclusive farm use, for example, does not mean that the school building does not have to meet state and local fire, building and other public safety regulations that apply to all such buildings, regardless of their location." *Josephine County v. Garnier*, 987 P.2d 1263, 163 Or. App. 333 (Or. App. 1999)

The staff has proposed a condition of approval concerning access in Exhibit J.2. Appellant takes issue with that for closing pre-existing driveways and the timing of when the condition must be fulfilled. The Hearings Officer finds that limiting access to County roads is a safety concern. The conditions provide that applicant can make an application for an Existing Non-Conforming Access code (MCRR 4.700) or a Road Rules Variance application (MCRR 16.000. This application should address Appellants

argument about the existing non-conforming access and the variance should be able to address arguments about the need for access for farm operations.

Hearings Officer is sympathetic to Appellants argument that the driveway that he has been using for 5 years was already permitted. Still, evidence needs to be in the record. The record shows that appellant has been obtaining the necessary permits. If this was a permit approval, the Hearings Officer would modify the recommended condition to allow the condition to be met before occupancy. This standard can be met with the imposition of conditions.

## **7.00 GH permit Criteria:**

### **Staff:**

**“In section 7.1 – 7.2 of the Decision, County Staff identified the need for additional information to address portions of the Code relative to GH requirements.**

**Staff provides the comments below in addition to their findings in the Decision for the following sections:**

Section 7.1: The Appellant provided a current Fire Service Agency Review (Exhibit H.2.n), which does not list any access road / driveway improvement requirements. An August 10, 2022 memorandum from the County Right-of-way office notes that paving will be required for the access and that additional information is needed to complete the Transportation Planning Review (Exhibit H.1, pp. 5 – 15).

Section 7.2: The Appellant references new documentation from an Oregon Licensed Professional Engineer to address this section (Exhibit H.3, p. 33). The new documentation (Exhibit H.2.m), must be reviewed by the HO to determine if the project qualifies for any relevant GH permit exemption(s) in MCC 39.5080. As noted in the Decision, the project does not qualify for the exemption listed in MCC 39.5080(N). If the project requires a GH permit, the HO is not able to grant a GH permit through the appeal process due to the fact that the Appellant did not include a GH permit in their application. The application subject to this appeal process specifically requested a GH permit exemption”. Exhibit J.1. pages 6-7.

### **Appellant:**

“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.”

\*\*\*

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." Exhibit K.1. page 6.

#### Hearings Officer:

The Hearing Officer finds that only limited area of the property is in the GH overlay zone. Part of that area is where the proposed driveway is located. The Hearings Officer finds that the previous driveway permit expired and new criteria has been adopted by the County. Exhibit H.1, page 5. Additionally, although work was done on the drive and it is currently being used, the conditions of the previous permit were not met as the required asphalt was not installed. Exhibit H.1, page 36.

Appellant believes that exemptions in MCC 39.5080 may apply. The Hearings Officer finds that the exemptions in subsection (N) do not apply because the property is located in the Tualatin River drainage.

Exemption (O) provides an exemption for: "Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces." The exemption for existing driveways (O), may apply. The Hearing Officer finds that the exemption for "existing driveways" only applies to existing driveway at the time the code was adopted or those lawfully permitted after the code was adopted. Appellant testified that the driveway is over 80 years old so it may apply. The exemption is only for "maintenance". It appears from the record that placement of asphalt on top of existing gravel without any other ground disturbance would qualify for exemption (O). Exhibit H.3. page 31.

If the application is refiled, and the access permit is reviewed and only asphalt is required over existing driveway, the Hearings Officer finds that Appellant may qualify for an exemption from the GH overlay.

### **8.00 Erosion and Sediment Control Permit**

#### **Staff:**

**"County Staff identified the need for additional information to address portions of the Code relative to ESC permit requirements.**

As a general matter, the Applicant will need to revise the Erosion and Sediment Control (ESC) plan (Exhibit A.15), so that the ESC plan serves as the central document relative to ESC permit requirements. A detailed notes page should be added to address requirements of the most recent edition of the City of Portland Erosion and Sediment Control Manual, OAR 340-041-0345(4), and MCC 39.6225. Additional pages may be added to the ESC plan to address ESC requirements currently shown as details in other areas of the preliminary plans. A comprehensive, ESC specific plan is necessary to ensure that the ESC requirements are satisfied and the County ESC inspector can readily identify compliance when a project commences."

#### **Appellant**

"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.

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."

**Hearing Officer:**

The Hearings Officer finds that the ESC is for health and safety, similar to grading permits and can be applied to this application. Typically, these standards are imposed based on engineering standards which are often clear and objective. The Hearings Officer is familiar with case law that in dicta indicates that clear and objective standards may need to be applied to housing outside the UGB. The Hearings Officers opinion is that when the courts do address this issue, they will find that this standard will not apply to farm dwellings outside the UGB. *See Warren v. Washington County*, LUBA No. 2018-089 (2018); 296 Or. App. 595, *cert. denied* 365 Or. 502 (2019).

The Hearings Officer finds that the County can impose conditions to require compliance with these criteria.

**9.00 Exhibits**

All exhibits are available for review in Case File T2-2021-14981, 12424 NW Springville Road  
<https://www.multco.us/landuse/12424-nw-springville-road-hearing-1>

Or by contacting case planner, Lisa Estrin at 503-988-0167 or via email at [lisa.m.estrin@multco.us](mailto:lisa.m.estrin@multco.us).

[Exhibit C.6 - Notice of Decision 06.14.2022 \(1.84 MB\)](#)

[Exhibit A.1 - General Application Form \(480.27 KB\)](#)

[Exhibit A.2 - Revised General Application Form \(457.98 KB\)](#)

[Exhibit A.3 - Applicant Narrative with Applicable Code Sections \(5.72 MB\)](#)

Case No. T2-2021-14981

- Exhibit A.4 - August 2017 Septic Cert. (1.54 MB)  
Exhibit A.5 - June 2018 Fire Service Agency Review (1.44 MB)  
Exhibit A.6 - Preliminary Floor Plans (18.65 MB)  
Exhibit A.7 - Preliminary Building Elevations (16.32 MB)  
Exhibit A.8 - 2017 Declaration of Deed Restriction (940.34 KB)  
Exhibit A.9 - 2017 Driveway Access Permit (5.14 MB)  
Exhibit A.10 - 2017 Recorded Waiver (395 KB)  
Exhibit A.11 - Development Plans - Full Set (3.85 MB)  
Exhibit A.12 - 2018 Existing Conditions Survey (318.73 KB)  
Exhibit A.13 - 2021 Existing Conditions Survey (346.82 KB)  
Exhibit A.14 - Demolition Plan (342.08 KB)  
Exhibit A.15 - ESC Plan and Details (558.78 KB)  
Exhibit A.16 - Site and Access Plan (308.4 KB)  
Exhibit A.17 - Driveway and Garage Profile (460.18 KB)  
Exhibit A.18 - Grading Plans (672.9 KB)  
Exhibit A.19 - Drainage Details (203.02 KB)  
Exhibit A.20 - Farm Use Plan (311.47 KB)  
Exhibit A.21 - February 2014 Farm Income Study (19.27 MB)  
Exhibit A.22 - Certification of Water Service (311.54 KB)  
Exhibit A.23 - February 2022 Stormwater Drainage Control Cert. (104.08 KB)  
Exhibit A.24 - ESC Narrative (128.56 KB)  
Exhibit A.25 - Updated Farm Management Plan (73.89 KB)
- Exhibit B.1 - Property Detail R961160130 (338.25 KB)  
Exhibit B.2 - Property Detail R961160590 (331.19 KB)  
Exhibit B.3 - Property Detail R961150770 (149.09 KB)  
Exhibit B.4 - Tax Map for 1N1W16D (156.28 KB)  
Exhibit B.5 - Tax Map for 1N1W15C (74.36 KB)  
Exhibit B.6 - Former MCC 39.4265(B) (2021) (34.03 KB)  
Exhibit B.7 - Copy of Website page from Reed Community Partners (1.32 MB)  
Exhibit B.8 - Reed Realty Advisors Business Registration (572.45 KB)  
Exhibit B.9 - Reed Dermatology Business Registration (569.31 KB)  
Exhibit B.10 - Copy of ODA Food Safety License Search (674.3 KB)

Case No. T2-2021-14981



Exhibit B.11 - MultCo Potential Gross Farm Sales Study (1.13 MB)

Exhibit B.12 - 2017 Ag Census - Multnomah (953.06 KB)

Exhibit C.1 - Incomplete Letter (386.3 KB)

Exhibit C.2 - Applicant's acceptance of 180 day clock (173.36 KB)

Exhibit C.3 - Applicant's response letter to County Incomplete Letter (8.03 MB)

Exhibit C.4 - Opportunity to Comment (1.35 MB)

Exhibit C.5 - OTC Website Attachments (18.6 MB)

Exhibit D.1 - Foster comments 4.15.2022 (165.07 KB)

Exhibit D.2 - Beovich comments 4.19.2022 (185.8 KB)

Exhibit D.3 - Hazel comments 4.19.22 (111.51 KB)

Exhibit D.4 - Talbot comments 4.19.2022 (184.88 KB)

Exhibit D.5 - Douglas comments 4.20.22 (412.42 KB)

Exhibit D.6 - Chesarek comments 4.21.22 (4.88 MB)

Exhibit D.7 - Chinnakonda comments 4.21.22 (3.13 MB)

Exhibit D.8 - Forest Park Neighbor Assoc comments 4.21.2022 (162.19 KB)

Exhibit D.9 - Yoo comments 4.21.22 (103.85 KB)

Exhibit E.1 - T2-2021-14981 Notice of Appeal (337.89 KB)

#### Multnomah County Exhibits

Exhibit H.1 - T2-2021-14981 Conditions of Approval Memo - Multnomah County 08.12.2022 (5.78 MB)

#### Appellant Exhibits

Exhibit H.2.a - Timeline - Appellant 08.12.2022 (248.32 KB)

Exhibit H.2.b - Email Correspondence - Appellant 08.12.2022 (19.34 MB)

Exhibit H.2.c- Application Fee Paid - Appellant 08.12.2022 (275.95 KB)

Exhibit H.2.d - Applicant's Response - Appellant 08.12.2022 (169.46 KB)

Exhibit H.2.e - Stamped and Signed Plans - Appellant 08.12.2022 (2.35 MB)

Exhibit H.2.f - Approved Septic Plan - Appellant 08.12.2022 (5.12 MB)

Exhibit H.2.g - Building Height Letter - Appellant 08.12.2022 (265.85 KB)

Exhibit H.2.h - 1936 Farm Aerial - Appellant 08.12.2022 (722.5 KB)

Case No. T2-2021-14981

Exhibit H.2.i - Initial Incomplete Letter - Appellant 08.12.2022 (551.84 KB)  
Exhibit H.2.j - Traffic Impact Study - Appellant 08.12.2022 (508.54 KB)  
Exhibit H.2.k - Wildlife Conservation Plan - Appellant 08.12.2022 (2.51 MB)  
Exhibit H.2.l - Original Driveway ROW Permit - Appellant 08.12.2022 (5.18 MB)  
Exhibit H.2.m - Geologic Hazards Permit - Appellant 08.12.2022 (2.72 MB)  
Exhibit H.2.n - 2022 Fire Agency Review Form - Appellant 08.12.2022 (350.99 KB)  
Exhibit H.2.o - Site Plans - Appellant 08.12.2022 (3.9 MB)  
Exhibit H.2.p - Stormwater Certificate - Appellant 08.12.2022 (267.34 KB)  
Exhibit H.2.q - Stormwater Calculations - Appellant 08.12.2022 (3.49 MB)  
Exhibit H.2.r - Mult Co 2015 Findings of Fact - Appellant 08.12.2022 (7.5 MB)  
Exhibit H.2.s - 2015 Land Use Approval - Appellant 08.12.2022 (1.73 MB)  
Exhibit H.2.t - Mult Co Potential Farm Income - Appellant 08.12.2022 (1.92 MB)  
Exhibit H.2.u - Photo Proof of Farm Work - Appellant 08.12.2022 (49.55 MB)  
Exhibit H.3 - Applicant's Presentation 08.12.2022 (15.47 MB)

#### Post-Hearing Exhibits

Exhibit I.1 - Letter - Christopher Foster 08.22.2022 (1.61 MB)  
Exhibit I.2 - Memos - Scott Reed 08.26.2022 (7.53 MB)

Exhibit J.1. - T2-2021-14981 LUP Memo 09.02.2022 (473.56 KB)  
Exhibit J.2. - EP-2022-16021 Transportation Memo 09.01.2022 (97.43 KB)

Exhibit K.1 - Post-Hearing Memo\_T2-2021-14981\_09-08-22 (1.72 MB)

2015

APP-27

## LAND USE PERMIT

**Case File:** T2-2014-3377

**Permits:** Dwelling in conjunction with farm use; Significant Environmental Concern for wildlife habitat; Hillside Development

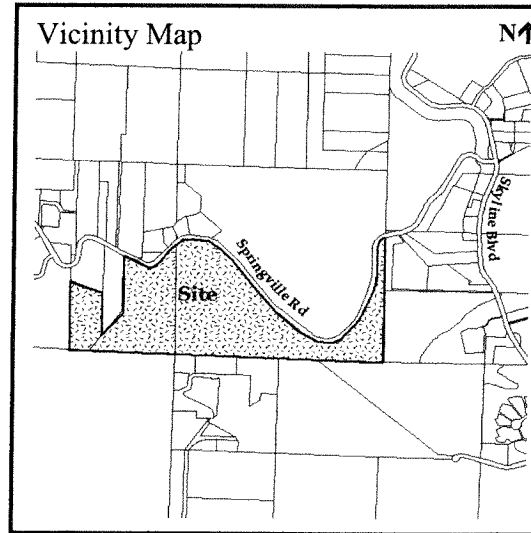
**Location:** 12460 NW Springville Road  
Tax Lots 2800 & 3100 , Section 16 and  
Tax Lot 600, Section 15,  
Township 1 North, Range 1 West, W.M.  
Tax Account #R961160130,  
R961160590 and R961150770

**Applicant:** Andrew Tull  
3J Consulting Inc.

**Owners:** Scott and Stacy Reed

**Base Zone:** Exclusive Farm Use (EFU) and Commercial Forest Use (CFU)

**Overlays:** Significant Environmental Concern for wildlife habitat and streams; Hillside Development



**Summary:** Permit application for a “dwelling customarily provided in conjunction with a farm use on not high-value farmland soils, capable of producing the median level of annual gross sales,” MCC 33.2625(D)(3), and for associated Significant Environmental Concern-Wildlife Habitat and Hillside Development Permits. The Owners are Scott and Stacey Reed (together, the “Owner”), represented by Andrew Tull (the “Applicant”) and the office of Perkins Coie, LLP.

**Decision:** Permits for the following are hereby approved (the “Permit”) for the subject property:

- A dwelling customarily provided in conjunction with a farm use on not high-value farmland soils, capable of producing the median level of annual gross sales. [MCC 33.2625(D)(3)]
- Significant Environmental Concern - Wildlife Habitat (SEC-h). [MCC 33.4570]
- Hillside Development Permit (HDP). [MCC 33.5505, *et seq.*]

All rights and responsibilities established in this Permit apply to the Owner, their successors in interest, and run with the land.

**This Permit is effective on September 11, 2015.**

**Opportunity to Review the Record:** A copy of the Planning Director Decision, and all evidence submitted associated with this application, is available for inspection, at no cost, at the Land Use Planning office during normal business hours. Copies of all documents may be purchased at the rate of 30-cents per page. The Planning Director Decision contains the findings and conclusions upon which the decision is based, along with any conditions of approval. For further information on this case, contact Lindsey Nesbitt, Senior Planner at 503-988-0213 or nesbittl@multco.us.

**Applicable Approval Criteria:** Multnomah County Code (MCC) and Multnomah County Road Rules (MCRR): MCC 33.2600- Purpose EFU, 33.2620- Allowed Uses for accessory structures, 33.2625(D)(3)- Non high value farmland soils, 33.2655 Single family dwellings conditions of approval prohibiting prohibitions on claims, 33.2660- Dimensional Requirements, 33.2675 Lots of record, 33.4500-Purpose of Significant Environmental Concern Overlay, 33.4515- Exceptions, 33.4520- Application, 33.4525- Applicable Approval Criteria, 33.4530- SEC permit required, 33.4550- Scope of Conditions, 33.4567- Clear and objective standards, 33.4570- Criteria for approval, 33.4575 Criteria for SEC Streams Permit, 33.550- Purpose Hillside Development and Erosion Control , 33.5505- Permits Required, 33.5510- Exempt Land Uses and Activities

Multnomah County Road Rules (MCRR) 4.00- Access to County Roads, 4.500- Sight Distance, 5.000 Transportation Impact, 9.000 Compliance Method

Copies of the referenced Multnomah County Code (MCC) and Multnomah County Road Rules (MCRR) sections can be obtained by contacting our office at 503-988-3043 or by visiting our website at <http://www.co.multnomah.or.us/landuse> or <http://web.multco.us/transportation-planning>.

## **CONDITIONS OF APPROVAL**

The following conditions of approval are necessary to ensure that approval criteria for this land use permit are satisfied. Citations to the Multnomah County Code (MCC) appearing in brackets indicate the standard(s) addressed by the associated.

After the effective date of this permit, application for building permits may be made with the City of Portland. When ready to have building permits signed off, the Applicant/Owner shall call the Land Use Planning Staff for an appointment for review and approval of the conditions and to sign the building permit plans. Please note, Multnomah County must review and sign off the building permits before the Applicant/Owner submits building plans to the City of Portland. Five (5) sets each of the site plan and building plans are needed for building permit sign off. Additional fees may be required at time of land use sign-off of the building permit.

1. This permit approval is based on the record in this matter, which may be referred to for the purpose of resolving any ambiguity in the statements herein. The residential use approved through this Permit may occur only in the manner approved herein and the proposed single-family home and associated site improvements shall be constructed as shown on the Revised Site Plan (to be labeled Ex. A.41 when submitted), which must be submitted prior to building permit sign off. Subject to compliance with MCC 33.2625(D)(3)(c) and MCC 33.4500 through 33.4550 and MCC 33.4575, farm use activities may be changed as needed by the Owner. The Owner is responsible for compliance with the terms of approval of this Permit.
2. The rights and obligations established in this Permit run with the land.

3. Unless stated otherwise, all references herein to the Multnomah County Code are to the provisions in effect on March 21, 2014.
4. The Owner shall record with the Multnomah County Recorder pages 1-5 of this Permit as well as the Revised Site Plan (to be labeled Ex. A.41 when submitted). Recording shall be at the Owner's expense. The Planning Director has no obligation to comply with any demand for building permit signoff or approval based on any right granted or obligation imposed in this Permit until such time as a copy of the recorded documents required by this paragraph has been filed with the Planning Director. [MCC 37.0670]
5. **This Permit EXPIRES as provided in MCC 37.0690.**
- A request for EXTENSION of the expiration deadline under MCC 37.0695 must be submitted prior to the expiration of the approval period.**
  - Construction of any farm buildings that may be required to be constructed as a condition of this Permit, shall be sufficient grounds to justify at least one (1) extension period.**
- [MCC 37.0690; MCC 37.0695]
6. The dwelling use, including dwelling structures and associated accessory structures (collectively referred to hereinafter as "dwelling use"), approved through this Permit is a "dwelling customarily provided in conjunction with a farm use on not high-value farmland soils, capable of producing the median level of annual gross sales," MCC 33.2625(D)(3). Any dwelling use of the Property pursuant to this Permit must be established and maintained in compliance with the criteria in MCC 33.2625(D)(3) and the other terms of approval of this Permit. Unless authorized by a separate permit, a dwelling use that is not established or maintained in compliance with the criteria in MCC 33.2625(D)(3) and the other terms of approval of this Permit is not allowed and all dwelling structures and accessory structures supporting such noncompliant dwelling use may be required to be removed from the Property. Upon request by the Planning Director, the Owner shall provide a report on the identity of the occupants of the dwelling approved through this permit and their relation to the farm use of the land as well as the annual gross sales for not more than a five year period prior to such request; the Planning Director shall not make such request without good reason nor make more than one such request within any three-year period. No such request shall be made earlier than one (1) year from final building inspection approval of the dwelling. The County shall provide the Owner a reasonable time to cure any violation. [MCC 33.2625(D)(3)]
7. Prior to the Planning Director's signoff for any building permit for the dwelling use, the Owner shall submit evidence to the Planning Director demonstrating the establishment of the farm use required by MCC 33.2625(D)(3)(c). The Applicant/Owner has two options to comply with this Condition, either of which shall satisfy this condition:
- Option 1: Given the Owner's proposed Farm Plan (e.g., Exs. A-30, A-31, A-32, and A-35), the Owner must submit evidence demonstrating:
- Lawful establishment of the replacement barn and milking parlor;
  - Lawful establishment of the 10-acre vineyard, field areas for crops, and herd grazing areas or preparation of each of these areas in accordance with industry standards in light of the time of year, maturity of the farm operation, and other industry-appropriate standards;
  - Lawful establishment of raw milk production from at least two cows; and
  - Lawful establishment of a herd of 8 beef cattle; or
- Option 2: The Owner shall submit an IRS Schedule F form from 2014 or later year demonstrating that the farm activity on the property met or exceeded \$14,246.84 in gross farm sales (the median gross farm sales shown on the farm income table approved in conjunction with this permit).

As 33.2625(D)(3)(c) relates to gross farm sales, expenses shall not be considered in determining compliance with this option.

[MCC 33.2625(D)(3)(g)].

8. Prior to the Planning Director's signoff for any building permit for development on the Property, the Owner shall submit to the Planning Director a Revised Site Plan (to be labeled Ex. A.41 when submitted) at a standard architect or engineers scale on a sheet larger than 11x17 inches such that the Revised Site Plan clearly and accurately demonstrates existing and proposed attributes of the Property as follows:
  - a. Location and dimensions of all existing and proposed structures as well as the 10-acre vineyard, field areas and herd grazing areas. Subject to compliance with MCC 33.2625(D)(3)(c) and MCC 33.4500 through 33.4550 and MCC 33.4575, farm use activities may be changed as needed by the Owner;
  - b. Location of the Significant Environmental Concern for streams (SEC-s) overlay zone, the Significant Environmental Concern for wildlife habitat overlay zone (SEC-w), and the Hillside Development overlay zone for purposes of demonstrating that none of the attributes listed in subparagraph (a) of this Condition 8 shall occur within such zones. Notwithstanding the preceding sentence, grazing is allowed within the SEC-s subject to review and approval by the Oregon Department of Agriculture. Nothing in this Condition prohibits the Owner from requesting land use approval for a use, including development, in such overlay zones in the future;
  - c. Compliance of all structures with limitations on use, maximum height limitations, and all applicable yard setbacks and the SEC-s buffer. Because no SEC-s permit is requested or granted as part of this Permit, no structure may be established within 250-feet of the centerline of the stream (i.e., the SEC-s mapped feature) on the Property. Nothing in this Condition prohibits the Owner from requesting land use approval for a structure within the SEC-s buffer in the future; and
  - d. Location of the right-of-way for purposes of demonstrating compliance with the front yard setback.
9. The dwelling approved in this Permit is proposed to be sited quite close to the SEC-s 250-foot buffer. Encroachment of the foundation of the dwelling into the SEC-s buffer is prohibited. Encroachment of construction equipment and activities into the SEC-s buffer is prohibited. The buffer shall be marked during construction of the dwelling.
10. Prior to the Planning Director's signoff for any building permit for the dwelling use, the Owner shall file with the Planning Director documentation establishing that the sanitarian has approved the proposed on-site septic system.
11. The Owner shall record in the Multnomah County deed records a deed restriction prohibiting the land Owners and successors in interest from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. Prior to the Planning Director's signoff for any building permit for the dwelling use, the Owner shall file with the Planning Director a copy of the recorded deed restriction required in this Condition 11.
12. Any new fencing must comply with MCC 33.4567(B)(7).
13. Nuisance plants listed in the table of MMC Section 33.4567(B)(7) shall not be planted on the Property and any such plants currently established on the Property or that establish on the Property in the future shall be removed from the Property. [MCC 33.4570(B)(7)]
14. No earth disturbing activity is allowed under this permit without a Grading and Erosion Control permit for such activity.
15. The Fire Marshal has stated that the dwelling structure approved through this permit must include a sprinkler system; the dwelling structure must comply with applicable Fire Marshall and Fire Code requirements at the time of building permit review.

- 16. The Applicant/Owner shall acquire a driveway permit for the site's access onto Springville Road prior to building permit approval. As part of this, the Applicant/Owner shall demonstrate demolition that permanently closes the two access points southwest of the permanent driveway. [MCRR 4.200]
- 17. The Owner shall maintain vegetation to provide the sight distance required by MCRR 4.500 in the eastern direction. [MCRR 4.500]
- 18. The Owner shall record in the Multnomah County deed records a deed restriction committing the Owner and successors in interest to participate in future right-of-way improvements to the extent that such improvements are roughly proportional to the impact of the use of the property. The deed restriction shall not commit the Owner or successor in interest to contributing more than a reasonable fair share of the cost of future road improvements or to dedicate property without just compensation. Prior to the Planning Director's signoff for any building permit for the dwelling use, the Owner shall file with the Planning Director a copy of the recorded deed restriction required in this Condition 18. [MCRR 9.400]

**Note:** Once the decision is final, application for building permits may be made with the City of Portland. When ready to have building permits signed off, the Applicant/Owner shall contact the Planning Director to schedule an appointment for review and approval of the conditions and to sign the building permit plans. Please note, Multnomah County must review and sign off the building permits before the Applicant submits building plans to the City of Portland. Five (5) sets each of the site plan and building plans are needed for building permit sign off. Additional fees may be required at time of land use sign-off of the building permit.

**NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR, OR SELLER:**  
ORS Chapter 215 requires that if you receive this notice it must be promptly forwarded to the purchaser.

## FINDINGS OF FACT

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

### **1.00 Project Description:**

**Staff:** The Applicant/Owner is proposing to construct a new dwelling in conjunction with farm use on the subject 84.43 acre tract of land. The proposed development consists of a ten bedroom dwelling with a pool, attached decks/patio areas, a new gravel driveway and various related accessory improvements.

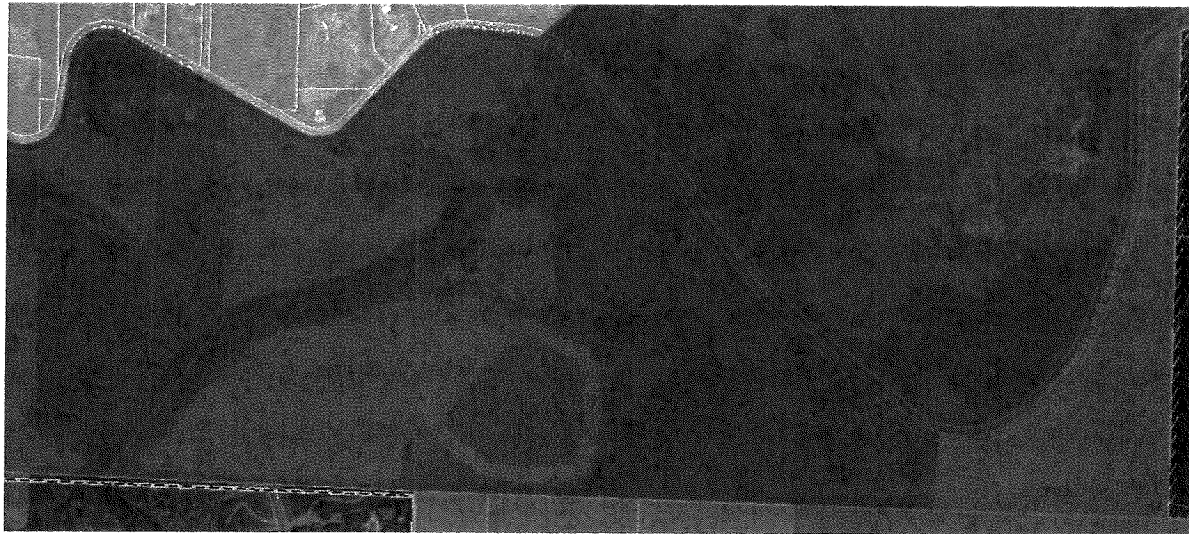
Current farm use includes the raising of approximately a dozen head of beef cattle, milking of four (4) dairy cows, and raising of 12 pigs. In May, 2015 the Applicant planted 20 acres of oats on the subject property to create feed for the livestock.

The Applicant/Owner proposes a Farm Plan that includes:

- Raw milk production and sales of approximately 1,825 gallons per cow per year (two cows total) of raw milk.
- Creation of a beef herd from dairy calves and market for beef sale.
- Vineyards growing high quality pinot noir grapes to be sold to Willamette Valley winemakers.
- Raising of chickens for the selling of eggs.
- Tree farm of approximately 1,600 pine trees.

### **2.00 Property Description & History:**

The subject tract consists of three tax lots (R324339, R324300 and R501639) of which 72.87 acres are zoned Exclusive Farm Use and 11.56 acres are zoned Commercial Forest Use – 2. The property includes three overlays: SEC-s for streams, SEC-w for wildlife habitat, and Hillside Development for steep slopes.





The map below identifies the SEC-s boundaries:



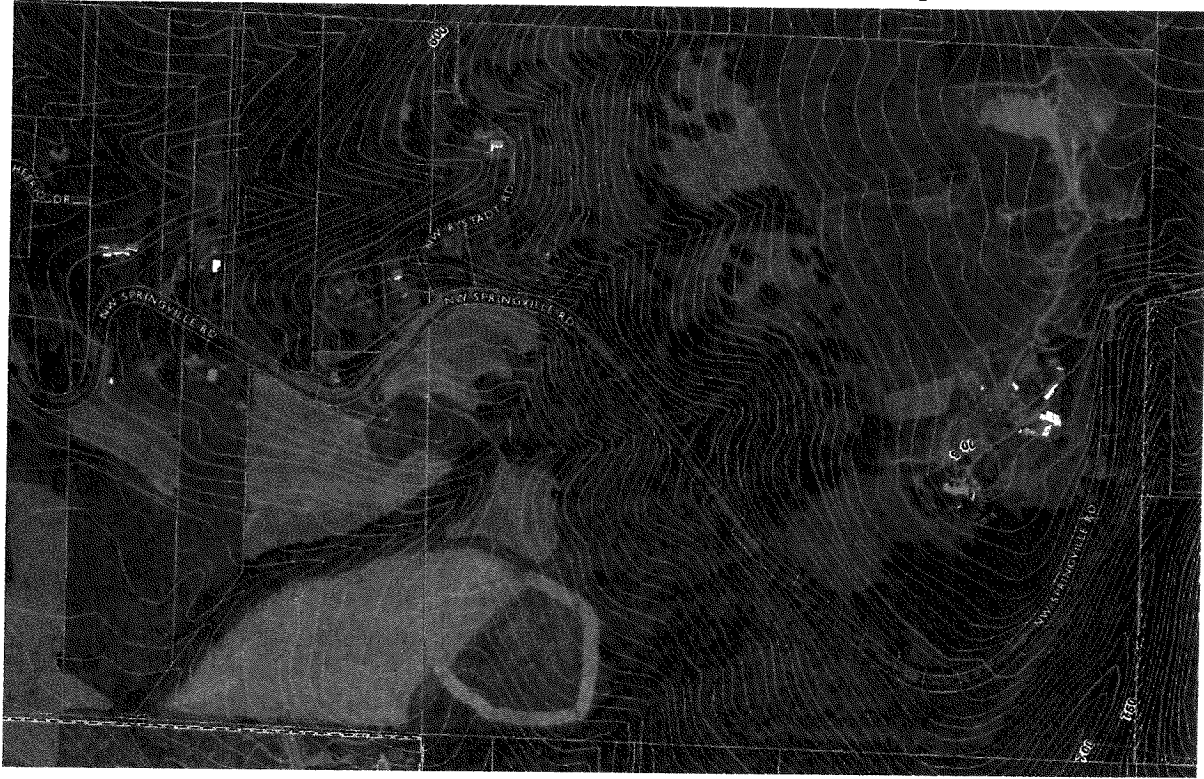
SEC-s Overlay Boundaries on Subject Tract

The map below shows that the Significant Environmental Concern for wildlife habitat overlay encompasses the entire tract.



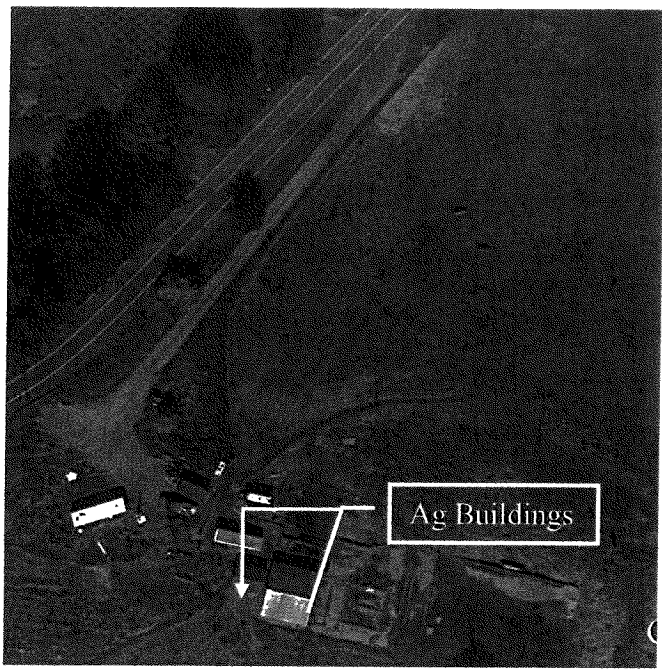
SEC-h Overlay Boundaries on Subject Tract

Areas of the property have a slope greater than 25%. Generally, as shown below, the eastern portion of the tract contains steeper terrain while the western portion has more gentle terrain. The County's Hillside Development ordinance is triggered when development occurs on areas with slopes 25% or more.



Topography of Tract

Per county tax records, the property is in two deferral programs: 51.43 acres in farm deferral; 33 acres in forest deferral. The tract currently contains two gravel access points off of NW Springville Road and an approximately 8-ft by 16-ft farm building and an approximately 24-ft by 24-ft milking parlor for two dairy cows (see below). These two buildings will be demolished for the construction of the dwelling. Two of the three access points will be decommissioned as part of the conditions of approval of this Permit.



**3.00 Exclusive Farm Use Criteria:**

**MCC 33.2675 Lot of Record**

**(A) In addition to the Lot of Record definition standards in MCC 33.0005, for the purposes of this district a Lot of Record is either:**

**(1) A parcel or lot which was not contiguous to any other parcel or lot under the same ownership on February 20, 1990, or**

**(2) A group of contiguous parcels or lots:**

**(a) Which were held under the same ownership on February 20, 1990; and**

**(b) Which, individually or when considered in combination, shall be aggregated to comply with a minimum lot size of 19 acres, without creating any new lot line.**

**1. Each Lot of Record proposed to be segregated from the contiguous group of parcels or lots shall be a minimum of 19 acres in area using existing legally created lot lines and shall not result in any remainder individual parcel or lot, or remainder of contiguous combination of parcels or lots, with less than 19 acres in area. See Examples 1 and 2 in this subsection.**

**2. There shall be an exception to the 19 acre minimum lot size requirement when the entire same ownership grouping of parcels or lots was less than 19 acres in area on February 20, 1990, and then the entire grouping shall be one Lot of Record. See Example 3 in this subsection.**

**3. Three examples of how parcels and lots shall be aggregated are shown below with the solid thick line outlining individual Lots of Record: [graphic omitted]**

**4. The requirement to aggregate contiguous parcels or lots shall not apply to lots or parcels within exception or urban zones (e.g. MUA- 20, RR, BRC, R-10), but shall apply to contiguous parcels and lots within all farm and forest resource zones (i.e. EFU and CFU), or**

**(3) A parcel or lot lawfully created by a partition or a subdivision plat after February 20, 1990.**

**(4) Exception to the standards of (A)(2) above:**

**(a) Where approval for a "Lot of Exception" or a parcel smaller than 19 acres under the "Lot size for Conditional Uses" provisions has been given by the Hearing Authority and the parcel was subsequently lawfully created, then the parcel shall be a Lot of Record that remains**

separately transferable, even if the parcel was contiguous to another parcel held in the same ownership on February 20, 1990.

**(B) In this district, significant dates and ordinances applicable for verifying zoning compliance may include, but are not limited to, the following:**

- (1) July 10, 1958, F-2 zone applied;**
- (2) December 9, 1975, F-2 minimum lot size increased, Ord. 115 & 116;**
- (3) October 6, 1977, MUA-20 and EFU-38 zones applied, Ord. 148 & 149;**
- (4) August 14, 1980, zone change from MUA-20 to EFU-38 for some properties, Ord. 236 & 238;**
- (5) February 20, 1990, lot of record definition amended, Ord. 643;**
- (6) April 5, 1997, EFU zone repealed and replaced with language in compliance with 1993 Oregon Revised Statutes and 1994 Statewide Planning Goal 3 Oregon Administrative Rules for farmland, Ord. 876;**
- (7) May 16, 2002, Lot of Record section amended, Ord. 982, reenacted by Ord. 997;**

**(C) A Lot of Record which has less than the minimum lot size for new parcels, less than the front lot line minimums required, or which does not meet the access requirements of MCC 33.2690 may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.**

**(D) The following shall not be deemed 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) A Mortgage Lot.**
- (4) An area of land created by court decree.**

**Staff:** The property consists of three parcels that are 7.67, 22.27, and 54.49 acres under the same ownership. The 7.67 acre parcel is aggregated with the other two acre parcel because it is less than 19 acres. Together, the three parcels aggregate into one single lot of record.

**33.2620 Allowed Uses**

**33.2620(O)(2) and (3) Accessory Structures**

**(2) If the accessory structure is a building, then to be an “allowed use” the footprint of the building in combination with the footprint of all other accessory buildings on the property shall not exceed 2,500 square feet.**

**(3) If the accessory structure has a bathroom or kitchen facility, then prior to issuance of the building permit the property owner shall record a deed restriction with the County Records that states that the owner understands and agrees that the structure cannot be occupied as a dwelling.**

**Staff:** The Applicant’s original site plan and narrative propose an accessory structure referred to as an in-law suite. The code permits one dwelling per tract. Kitchen and bathing facilities allow accessory structures to be utilized as dwelling units. Accessory structures are permitted, but may not contain elements that would qualify the structure as a dwelling.

As a condition of approval of this permit, Applicant/Owner will submit a Revised Site Plan. If the Applicant/Owner proposes to retain an accessory structure, such as a pool house, the Applicant/Owner must demonstrate that the structure cannot be used as a separate dwelling unit, pursuant to MCC 33.2620(O).

### 33.2660 Dimensional Requirements

Requirement	Standards	Applicant's Proposal
Minimum lots size	80 Acres	84.43 Acres
<b>Setbacks:</b> Front Side Street Side Rear	30 feet 10 feet 30 feet 30 feet	The Applicant's narrative states that all required yard setbacks will be met. A condition of approval has been adopted requiring a revised site plan demonstrating setback requirements will be met.
Maximum Structure Height	35 feet	Elevation drawings of the proposed dwelling were not submitted.
Minimum front lot line length	50 feet	The property exceeds the minimum lot line length.

**Staff:** The original site plans submitted with the Application provided quite a bit of information, but not all of the information clearly demonstrates how each above standard will be met. Staff finds that that substantial evidence in the record demonstrates that meeting these standards and criteria is feasible. As a condition of approval of this permit, Applicant/Owner will submit a revised site plan that more clearly demonstrates compliance with standards such as setback dimensions, building elevations, etc. (see conditions of approval).

### 33.2625 Review Uses



Soil Map #2

**33.2625 Review Uses**

**(D) A dwelling, including a mobile or modular home, customarily provided in conjunction with a farm use:**

**(3) Not high-value farmland soils, capable of producing the median level of annual gross sales. On land not identified as high-value farmland a dwelling may be considered customarily provided in conjunction with farm use if:**

**(a) The subject tract is at least as large as the median size of those commercial farm or ranch tracts capable of generating at least \$10,000 in annual gross sales that are located within a study area which includes all tracts wholly or partially within one mile from the perimeter of the subject tract [the median size of commercial farm and ranch tracts shall be determined pursuant to OAR 660-33-135(3)]; and**

**Staff:** The property is an 84.43-acre tract comprised of three tax lots. The term "tract" is defined as parcels under common ownership. In this case, one tax lot is split between the EFU and CFU zones. Approximately 11.56 acres of the tract are zoned CFU and 72.87 acres are zoned EFU. Because of the definition of tract, the wording of Multnomah County Code criteria in Chapter 33, and the ability to implement farming practices on the CFU portion of the tract, staff reviewed and calculated the soil classifications of the entire tract. The tract has a mixture of high-value and low-value soils with the majority of the soils classified as low-value, therefore, the subject tract is not high-value farmland soils.

Documentation submitted by the Applicant demonstrating the study area, qualifying tracts, and income table is provided in Exhibit A.31 and A.32. The Applicant provided a study and a map showing 7 tracts within a 1 mile study area that qualify as meeting the \$10,000 annual gross sales based on soil types. Staff reviewed the data and determined that two of the tracts are not eligible for use because the tracts (Springville Investors and Thompson) are in a forest deferral program only and are not being utilized for commercial farming purposes.

Staff has recalculated the data using the 5 qualified tracts as follows:

<b>Ownership</b>	<b>Size in Acres</b>	<b>Income</b>
Zahler	37.48	\$13,550.50
TriCounty Investors	38.23	\$14,943.18
Malinowski	33.03	\$12,786.38
Burnham	114.75	\$37,936.75
Beovich	93.48	\$26,249.83
<b>Median</b>	<b>63.39</b>	<b>\$14,246.84</b>

The subject tract is 84.43 acres, which exceeds the median size of those commercial farm or ranch tracts qualifying for analysis under this provision in this instance.

*Criterion met.*

**(b) The subject tract is capable of producing at least the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in subsection (a) of this section; and**

**Staff:** Per the table above, the County's non-high value soil income report (Exhibit B.5), and the Applicant's analysis (Exhibit A.32), the median level of annual gross sales applicable to this application is \$14,246.84. As explained in the June 5, 2015 memorandum from Andrew Tull, the Owner's land use planning consultant (Exhibit A32), the subject tract is capable of producing at least \$23,397.32 of gross annual sales of county indicator crops based on soil type.

*Criterion met.*

**(c) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in subsection (b) of this section; and**

**Applicant:** The Applicant's full response is provided in Exhibits A.4, A.25, and A.29-A.40. The following provides a summary:

The Applicant's narrative cites the ORS, which state that a "farm use" is the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling of crops or the feeding, breeding, management and sale of, or the produce of livestock, poultry, fur-bearing animals or honey bees or for dairying and the sale of dairy products or any other agricultural or horticultural use of animal husbandry or any combination thereof.

The Applicant cited a LUBA case holding that "as long as the primary purpose of the listed activity is to obtain a profit in money, the activity is a farm use" and the "statute is silent as to the mechanism by which that profit in money may be realized." *Oregon Natural Desert Association v. Harney County*, 42 Or LUBA 149, 157 (2002).

The subject property is currently employed as a dairy; the primary purpose is to sell milk. Currently, the farm has 12 head of cattle in the beef herd, four milk cows, and 12 pigs. In May, 2015 the Owner planted 20 acres of oats on the subject property to create feed for the livestock.

This criterion does not require that the subject property currently produce the annual gross sales required, but requires that the farm use be capable of generating such annual gross sales. "At our current operating levels, we estimate we will have gross dairy income of approximately \$43,780 per year. Each cow produces 5 gallons of milk a day, we have six cows (only two can be wet at one time), which equates to about 10 gallons of milk per day. We sell the milk in ½ gallon reusable bottles for \$6 per ½ gallon or \$12 per gallon. If we sell all the milk produced, we would generate approximately \$840 in gross dairy income per week. Additionally, the pigs will produce additional income when they are ready to be processed. Currently, in the state of Oregon we are not required to have a dairy license because we produce raw milk with only two cows producing at once, we don't advertise, and we sell from the farm." Ex. A.30.

**Staff:** As explained above, the subject tract is currently employed for a farm use, including the raising of milk cows, beef cattle, pigs, and oats.

This criterion requires that the farm use of the property be capable of producing the median annual gross sales established under subsection (b), above, but does not require that the Owner actually produce the median annual gross sales. The Applicant/Owner submitted substantial evidence demonstrating that the farm use is capable of producing the annual gross sales required in subsection (b), including a proposed Farm Plan, photographs of existing farm uses, a IRS Schedule F showing \$12,840 of gross farm sales in 2013, a farm sales ledger showing gross farm sales of \$2,124 in May, 2015, an affidavit describing existing farm uses, and receipts for farm supplies and farm insurance. On the other hand, there is no substantial evidence indicating that the farm use, as it currently exists and as proposed in the Farm Plan, cannot achieve the median gross farm sales established under subsection (b).

The Owner's proposed Farm Plan includes the following elements:

- Raw milk production and sales of approximately 1,825 gallons per cow per year (two cows total) of raw milk. Only two cows are allowed to be used for raw milk at one time. The property owners sell the milk in half gallon increments for \$6.
- Creation of a beef heard from dairy calves and market for beef sale.
- Vineyards growing high quality pinot noir grapes to be sold to Willamette Valley winemakers.
- Raising of chickens for the selling of eggs.

- Tree farm of approximately 1,600 pine trees.

The subject tract is currently being used for a portion of the Owners' Farm Plan, however at this time, the full farming operation, as proposed in the Farm Plan, has not been implemented. The Farm Plan indicates that the proposed farming practices described in the Farm Plan can be implemented after the farm dwelling is constructed.

Staff finds that implementation of the Farm Plan is sufficient to demonstrate that the farm use is capable of producing the annual gross sales required in subsection (b). In addition, if the Applicant/Owner can demonstrate that the median annual gross sales has been met, such a demonstration would be conclusive evidence that this criterion is satisfied.

Section (g) below allows approval of the dwelling permit upon a demonstration that the farming operation is implemented prior to issuance of the building permit. Analysis and conditions required to ensure compliance with this section and section (g) are provided below.

*Staff finds that the subject tract is currently employed for a farm use. Staff finds that the Applicant/Owner can demonstrate that the proposed farm use is capable of producing the annual gross sales required by subsection (b) by satisfying Condition 7. This criterion is met with satisfaction of Condition 7.*

**(d) The subject lot or parcel on which the dwelling is proposed is not less than ten acres; and**

**Staff:** The subject tract is approximately 84.43 acres in area, exceeding the 10-acre requirement.

*Criterion met.*

**(e) except as permitted in ORS 215.283(1)(p) (1999 Edition)(i.e. seasonal farmworker housing), there is no other dwelling on the subject tract: and**

**Staff:** There are currently no dwellings located on the subject tract.

*Criterion met.*

**(f) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale; and**

**Applicant:** LUBA has construed the "principally engaged" requirement as requiring a demonstration that one or more persons in the home can devote the number of hours necessary to farm the land. *Alpin v. Deschutes County*, 2014 Or LUBA \_\_, (LUBA No. 2013-055 at 10) (3/12/2014). This is not a fixed amount of time and depends on the nature of the farm use. *Id.* Moreover, LUBA has stated that occupants of the home may be employed offsite so long as one or more occupants are able to devote the number of hours required for a farm use. *Id.*; *Oregon Natural Desert Association v. Harney County*, 65 Or LUBA 246, 262 (20 12). The Owner intends to commit to farm activities full-time once he is able to occupy the home, and several of the Owner's family members will also be "principally engaged" in operating the farm.

The property owner submitted documentation of the following persons currently engaged in farming practices, and future farming practices once the residence is established:

Current:

Scott Reed (property owner) 2 hours per day average.

Gordon Welch (farm worker) 6 hours per day average.

Future, once residence is established:

Scott Reed (property owner) 8 hours per day average

Gordon Welch (farm worker) 6 hours per day average



Family Members to be living in the residence:  
 Bruce Reed 8 hours per day average  
 Linda Hernandez 8 hours per day average  
 Barbara Rummonds 8 hours per day average  
 William Rummonds 4 hours per day average  
 Reed Children 1 hour per day for chores.

The farm use will include three primary aspects, as explained in the Farm Plan. The first is the dairy operation, which is currently underway. Activities will include raising milk cows and milking the cows. The milk generated will be sold commercially. The second aspect is raising the beef herd, which is already onsite and will be expanded from calves generated by the dairy herd. In support of these two farm uses will be the cultivation of grass and oats on the Property for livestock feed. Farming activities will include caring for livestock, planting/harvesting the oats, milking, bottling, and marketing the milk, and marketing the beef cattle and or meat. The third aspect of the farm operation will be the proposed vineyard. This will involve the planting, fertilizing, watering, pruning, and harvesting of grapes.

LUBA has expressly declined to define the meaning of "at a commercial scale." *Oregon Natural Desert v. Harney County*, 42 Or 149, 173 (2002). The existing and proposed uses are at a commercial scale for two reasons. First, these uses represent utilization of the majority of the 84 acre subject property. At full utilization, farm uses will include 20 acres of oats, 20 acres of pastureland with associated farm buildings, including a milking parlor, and 10 acres of vineyard. Second, the products generated from these activities will be sold and are anticipated to generate a net annual income of \$43,650 after the vineyard reaches maturity. The combined dairy/beef farm operation is anticipated to generate in excess of \$80,000 in gross income.

In summary, the Owner and his family members, including his parents and his wife's parents will occupy the dwelling. The property owner will be able to farm the property on average 8 hours per day and will be assisted by family members residing in the dwelling. The Owner's family members currently live out of state and will be moving to the home to assist with farming once the home is constructed.

**Staff:** Consistent with LUBA case law identified by the Applicant, the requirement that an occupant of the home be principally engaged in the farm use is met if one or more persons in the home can devote the number of hours necessary to farm the land. The application materials demonstrate that property owner, Scott Reed, is farming at the site part time and a farm helper, Gordon Welch, has been farming the majority of the time in order to establish the farming practice. Application materials also indicate that once the dwelling is established, the property owner, Scott Reed, and his family members residing at the residence will be principally engaged in farming practices. A condition of approval has been adopted requiring that the proposed use satisfy all applicable requirements of MCC 33.2625(D)(3), which include a requirement that at least one occupant of the dwelling on site will be "principally engaged" in the farm use of the property.

*As conditioned, this criterion is met.*

**g. If 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 subsection (c) of this section.**

**Staff:** Certain components of Owner's proposed farm operation plan are already being implemented. This Permit is subject to a condition of approval designed to ensure full implementation of a farm operation at a level capable of producing the required annual gross sales of \$14,246.84 prior to issuance of any building permits. Per the conditions of approval, farm use activities may be changed as

needed by the Applicant as long as the farm use is capable of generating the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in subsection (a). Further, staff finds that the Farm Plan proposed by the Owner, described above and described further herein, is capable of meeting the annual gross sales requirement:

#### Raw Milk and Beef Production

Raw milk production from two cows producing approximately 5 gallons per day generating approximately 1,825 gallons per cow per year for a total production of 3,650 gallons of milk. The Owner proposes to sell the milk for \$12 per gallon. It is estimated that the raw milk sales will produce \$43,800 per year. Exhibit A.31 and A.32 provide the calculations of the median gross farm income within the study area determined pursuant to subsection (a).

The following raw milk sales documentation has been provided:

- 2013 Schedule F for the farm.
- Receipt for the purchase of 2,000 pounds of oats and 50 pounds of peas.
- May 2015 sales ledger of raw milk (but not for the entire year the application materials indicate the raw milk has been in production).
- Farm insurance policy.
- Signed affidavit from the property owner, Scott Reed, that he is the primary farmer.

In addition to raw milk production, the Owner also proposes to manage a herd of 8 beef cattle.

The Owner estimates a profit of \$15,140 per year with the milk and beef sales.

#### Vineyard for grape production

The plan also includes planting of 10 acres for growing of wine grapes to be sold to local wine makers. The original site plan submitted with the Application does not show the proposed location for the vineyard nor do the application materials present an implementation plan for the vineyard. Documentation was provided for estimated cost each year the vineyard will be in production, but timing for installation of the vineyard was not provided. The plan estimates the following profits:

Annual Revenue Year 1, \$0

Annual Revenue Year 2, \$0

Annual Revenue Year 3, \$27,000

Annual Revenue Year 4, \$67,500

Annual Revenue Year 5, (full production) \$52,490

Year 1 net operating income, \$52,490

Year 2 net operating income, \$52,490

Year 3 net operating income, \$25,490

Year 4 net operating income, \$15,010

Year 5 net operating income, \$28,510

#### Farm Structures

Currently, there is a temporary milking parlor and an accessory storage structure on site. However, these structures are in the location of the proposed dwelling and will be demolished to accommodate the dwelling construction. The Farm Plan calls for the construction of a new 24-foot by 40-foot permanent milking parlor and a 40-foot by 100-foot new feed barn. The Farm Plan does not define

when or where these structures will be built.

#### Supplemental/Secondary Income

- The Farm Plan includes supplemental income from the selling of eggs from the 50 plus chickens that are currently being raised on the farm. The property owner proposes to sell the eggs for \$5 per dozen. Egg sales information and documentation was not provided.
- The Owner indicated that a portion of the site has been planted with approximately 1,600 pine trees, which will be harvested and sold when ready at a future date.

Staff finds that implementation of the Farm Plan is sufficient to demonstrate that the farm use is capable of producing the annual gross sales required in subsection (b). Alternatively, if the Applicant/Owner can demonstrate that the median annual gross sales has been met, such a demonstration would be conclusive evidence that this criterion is satisfied. Staff therefore imposes Condition 7 to ensure that the farm use is capable of producing the annual gross sales required in subsection (b).

#### **MCC 33.2655 Single Family Dwelling Condition of Approval Prohibiting Prohibitions on Claims**

**As a condition of approval of a single family dwelling, the landowner for the dwelling shall sign and record in the deed records for the county a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.**

**Staff:** A condition of approval has been adopted requiring the property owner to sign and record the above-mentioned deed restriction.

#### **4.00 Significant Environmental Concern Criteria**

##### **33.4515 EXCEPTIONS**

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

**(1) Farm use, as defined in ORS 215.203 (2) (a), including buildings and structures accessory thereto on "converted wetlands" as defined by ORS 541.695 (9) or on upland areas.**

**Staff:** The subject tract is subject to the SEC-h (wildlife habitat) and the SEC-s (stream) overlays. In upland areas, farming practices and structures are exempt from SEC-h regulations. In contrast, not all farming practices are exempt from SEC-s regulations.

The Owner does not propose any farming practices in the SEC-s zone and a condition of approval of this Permit requires the filing of a Revised Site Plan demonstrating that neither farming practices nor structures will occur or be established in the SEC-s, except as otherwise permitted outright in the SEC-s zone.

##### **33.4567 SEC-h Clear and Objective Standards**

**At the time of submittal, the applicant shall provide the application materials listed in MCC 33.4520(A) and 33.4570(A). The application shall be reviewed through the Type I procedure and may not be authorized unless the standards in 33.4570(B)(1) through (4)(a)-(c) and (B)(5) through (7) are met. For development that fails to meet all of the criteria listed above, a separate land use application pursuant to MCC 33.4570 may be submitted.**

### 33.4570 Criteria for Approval of SEC-h Permit

#### (B) Development standards:

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

**Staff:** The proposed home will be located in an existing cleared portion of the site where a home was previously located.

*Criterion met.*

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

**Staff:** The Applicant's site plan demonstrates that the single family home will be located within 200 feet of the road. However, the site plan submitted does not clearly demonstrate the location of the right-of-way or the accurate front yard setback. A condition has been adopted requiring submission of a revised scaled site plan prior to issuance of a building permit.

*As conditioned, the proposal complies with this criterion.*

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

**Staff:** The site plan demonstrates that the proposed driveway will not exceed 500 feet in length.

*Criterion met.*

**(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.**

**Staff:** The proposed driveway location will be located directly across from an access road, NW Rystadt Road, thereby satisfying subsection (b), above. Transportation Planning (the County Road Official) has reviewed the site plan and the proposed driveway location. There are currently three access points to the site. A condition has been adopted requiring two of the access points to be terminated prior to final occupancy of the dwelling. The proposed driveway location has been approved by transportation planning staff subject to the condition that the Applicant/Owner obtains an access permit at time of building permit submittal.

*The proposed driveway complies with this requirement.*

**(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.**

**Staff:** The intent of this code section is to require developments to be clustered in order to create open space areas for wildlife habitat and to reduce potential human impact to the wildlife areas. The adjacent parcel to the west has a house located within 200 feet of the shared side property line. This is

the west side property line for the subject parcel. The proposed house is not within 300 feet of the shared side boundary line of the property to the west. However, staff believes the proposed location of the dwelling better meets the intent of the code language because the location will:

- Provide better clustering with the dwellings across Springville Road to the north of the property.
- Best maintains existing open space that provides access to an existing vegetative corridor across Springville Road (to the north). Access to the vegetative corridor on the north side of Springville Road would be blocked with the house sited within 300 feet of the west property line.
- The proposed location best accommodates competing code requirements and reduces the overall impacts associated with a residential development footprint. Driveway location, access spacing, and site distance standards only allow one location for the access drive to Springville Road for the subject property. In addition to driveway siting standards, the access drive for the property cannot be located elsewhere on site because of the SEC stream overlay and topography. Requiring the dwelling to be moved closer to the western property line would require the drive way length to be extended an additional 215 feet. The proposed driveway will be 450 feet in length. The clear and objective SEC criteria limit the driveway length to 500 feet. By requiring the house to be located within 300 feet of the western property line, the driveway length would have to be increased from 450 feet to approximately 615 feet, exceeding the allowed driveway length.
- The proposed location reduces the needed driveway length, creates a reduced residential development footprint on the site, and best clusters with the existing residential development on the north side of Springville Road.

*Criterion met.*

**(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 permitted. 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.**

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

**Staff:** The Applicant's narrative states that fencing is not proposed at this time. A condition of approval has been adopted requiring that any new fencing comply with these standards.

*Staff finds that it is feasible for future fencing on the property to meet the above standards.*

**(7) The nuisance plants listed in the table of this code section shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property:**

**Staff:** The Applicant's narrative states that nuisance plants will be removed from the site and will not

be planted in the future. *As conditioned, the proposal complies with this requirement.*

*As conditioned, the proposed development can meet the standards of MCC 33.4570(B) and a Wildlife Conservation Plan is not required.*

### **33.4575 CRITERIA FOR APPROVAL OF SEC-S PERMIT –STREAMS**

**(B) Except for the exempt uses listed in MCC 33.4515, no development shall be allowed within a Stream Conservation Area unless approved by the Approval Authority pursuant to the provisions of MCC 33.4575 (C) through (F).**

**Staff:** See findings under MCC 34.4515(A)(1) above. *As conditioned, criterion met.*

## **5.00 Hillside Development Criteria**

### **33.5515 APPLICATION INFORMATION REQUIRED**

**An application for development subject to the requirements of this subdistrict shall include the following:**

**(A) A map showing the property line locations, roads and driveways, existing structures, trees with 8-inch or greater caliper or an outline of wooded areas, watercourses and include the location of the proposed development(s) and trees proposed for removal.**

**Staff:** The Applicant submitted a site plan showing some of the required features and, through the conditions of approval, is required to file a Revised Site Plan that satisfies this submittal requirement. In addition, the Applicant submitted a completed HDP-1 Form (Ex. A.9) and a geotechnical report (Ex. A.10) demonstrating that the site is suitable for construction of the proposed improvements provided that the recommendations identified in the report are followed.

*This Permit is subject to a condition requiring the Applicant/Owner to obtain a Grading and Erosion Control permit prior to any earth disturbing activities.*

**(B) An estimate of depths and the extent and location of all proposed cuts and fills.**

**Staff:** The estimated depths and extent of cuts and fills have been provided on the form HDP-1.

**(C) The location of planned and existing sanitary drainfields and drywells.**

**Staff:** The site plan demonstrates the proposed locations. Of note, a condition of approval has been adopted requiring the Applicant/Owner to obtain final septic system location and design approval from the Sanitarian prior to land use planning signing off on building permits.

**(D) Narrative, map or plan information necessary to demonstrate compliance with MCC 33.5520 (A). The application shall provide applicable supplemental reports, certifications, or plans relative to: engineering, soil characteristics, stormwater drainage, stream protection, erosion control, and/or replanting.**

**Applicant:** The Applicant has submitted a conceptual site plan showing the required components of MMC section 33.5520(A). This plan will be further refined at the time of submission for a Grading and Erosion Control Permit.

**Staff:** A Grading and Erosion Control permit must be obtained prior to commencement of earth disturbing activities.

*As conditioned, criterion met.*

**(E) A Hillside Development permit may be approved by the Director only after the applicant provides:**

**(1) Additional topographic information showing that the proposed development to be on land with average slopes less than 25 percent, and located more than 200 feet from a known landslide, and that no cuts or fills in excess of 6 feet in depth are planned. High groundwater conditions shall be assumed unless documentation is available, demonstrating otherwise; or**

**(2) A geological report prepared by a Certified Engineering Geologist or Geotechnical Engineer certifying that the site is suitable for the proposed development; or,**

**(3) An HDP Form- 1 completed, signed and certified by a Certified Engineering Geologist or Geotechnical Engineer with his/her stamp and signature affixed indicating that the site is suitable for the proposed development. (a) If the HDP Form- 1 indicates a need for further investigation, or if the Director requires further study based upon information contained in the HDP Form- 1, a geotechnical report as specified by the Director shall be prepared and submitted.**

**Applicant:** The Applicant has submitted a Geotechnical Report (Ex. A.10) and a site plan showing the areas of the site which contain slopes of 25% or more. The Geotechnical report has not documented any known landslide hazards on the site. The Applicant's Geotechnical report has provided several recommendations for site and building construction. These recommendations will be included within the design of the structures and site improvements.

**Staff:** The Applicant has submitted a completed HDP Form-1 (Ex. A.9) and a Geotechnical Report and Landslide Hazard Study (Ex. A.10), thereby satisfying subsections (E)(2) and (3). The reports state the subject site may be suitable for the proposed development if potential hazards are addressed as described in the report.

*This criterion is met. As noted above, final building design and site development must incorporate the recommendations identified in the Geotechnical Report to alleviate potential hazards (Exhibit A.10).*

#### **(F) Geotechnical Report Requirements**

**(1) A geotechnical investigation in preparation of a Report required by MCC 33.5515(E)**

**(3) (a) shall be conducted at the applicant's expense by a Certified Engineering Geologist or Geotechnical Engineer. The Report shall include specific investigations required by the Director and recommendations for any further work or changes in proposed work which may be necessary to ensure reasonable safety from earth movement hazards.**

**(2) Any development related manipulation of the site prior to issuance of a permit shall be subject to corrections as recommended by the Geotechnical Report to ensure safety of the proposed development.**

**(3) Observation of work required by an approved Geotechnical Report shall be conducted by a Certified Engineering Geologist or Geotechnical Engineer at the applicant's expense; the geologist's or engineer's name shall be submitted to the Director prior to issuance of the Permit.**

**(4) The Director, at the applicant's expense, may require an evaluation of HDP Form- 1 or the Geotechnical Report by another Certified Engineering Geologist or Geotechnical Engineer.**

**Staff:** The Applicant submitted a stamped and signed HDP-1 Form and a Geotechnical Report and Landslide Hazard Study. The reports state the subject site may be suitable for the proposed development if potential hazards are addressed as described in the report (Exhibits A.9 and A.10).

*The Applicant's Geotechnical Report is consistent with the above requirements. Substantial evidence demonstrates that the Applicant will be able to comply with subsections (2) through (4), as applicable.*

As noted above, final building design and site development must incorporate the recommendations identified in the Geotechnical Report to alleviate potential hazards (Exhibits A.9 and A.10).

**(G) Development plans shall be subject to and consistent with the Design Standards For Grading and Erosion Control in MCC 33.5520 (A) through (D). Conditions of approval may be imposed to assure the design meets those standards.**

**Applicant:** The Applicant’s proposed development will comply with MCC Section 33.5520. Compliance will be reviewed by the County upon receipt of the Applicant’s submission for a Grading and Erosion Control Permit. The Applicant welcomes a condition of approval to obtain a Grading and Erosion Control Permit prior to the initiation of construction activities.

**Staff:** The Applicant has not yet submitted a grading and erosion control permit and has not provided application materials demonstrating compliance with applicable sections of MCC 33.5520. As set forth in the conditions of approval, Grading and Erosion Control permit must be obtained prior to commencement of earth disturbing activities.

*As conditioned, criterion met.*

**\*\*\* NOTE: FINAL BUILDING DESIGN AND SITE DEVELOPMENT MUST INCORPORATE THE RECOMMENDATIONS IDENTIFIED IN THE GEOTECHNICAL REPORT TO ALLEVIATE POTENTIAL HAZARDS (EXHIBITs A.9 and A.10).**

**6.00 Transportation Standards**

**MCRR 4.000 Access to County Roads**

**MCRR 4.100 Required Information:** Applicants for a new or reconfigured access onto a road under County Jurisdiction may be required to provide all of the following:

- A. Site Plan;**
- B. Traffic Study-completed by a registered traffic engineer;**
- C. Access Analysis-completed by a registered traffic engineer;**
- D. Sight Distance Certification from a registered traffic engineer; and**
- E. Other site-specific information requested by the County Engineer**

**Staff:** The Applicant proposes a new access onto *NW Springville Road* under County Jurisdiction. The road is classified as a *Rural Collector*. The new access is shown on the Applicant’s site plan. All required information has been submitted.

**MCRR 4.200 Number:** Reducing the number of existing and proposed access points on Arterials and Collectors and improving traffic flow and safety on all County roads will be the primary consideration when reviewing access proposals for approval. One driveway access per property will be the standard for approval. Double frontage lots will be limited to access from the lower classification street. Shared access may be required in situations where spacing standards cannot be met or where there is a benefit to the transportation system.

**Staff:** The subject property is proposed to be served by one driveway. The site plan currently shows three access points, two of which are proposed to be demolished. A sight distance analysis has been conducted for the northern-most access, which is the proposed driveway.

*A condition has been added requiring demolition of the two access points southwest of the proposed permanent access point. An access permit will also be required. As conditioned, this standard is met.*



**MCRR 4.300 Location:** All new access points shall be located so as to meet the access spacing standards laid out in the Design and Construction Manual.

**Staff:** For a road classified as a *Rural Collector*, the spacing standard is 100 feet. The minimum distance is applied to both driveways on the same side of the street as well as driveways opposite to the site. The Applicant has submitted a site plan demonstrating that the proposed driveway can meet the spacing standard.

*This standard is met.*

**MCRR 4.400 Width:** Driveway and Accessway widths shall conform to the dimensions laid out in the Design and Construction Manual.

**Staff:** For a *Single Family Residential* use, a new or reconfigured driveway must be 12 to 25 feet wide. The Applicant's site plan demonstrates that the new driveway will be 20 feet wide.

*This standard is met.*

**MCRR 4.500 Sight Distance:** All new access points to roads under the County's jurisdiction must have a minimum sight distance equal to the standards in the Design and Construction Manual and AASHTO's A Policy on Geometric Design of Highways and Streets.

**Staff:** Multnomah County Road Rules Section 4.500 states that access points to roads under the County's jurisdiction must have a minimum sight distance equal to the standards in the County Design and Construction Manual or AASHTO's *A Policy on Geometric Design of Highway and Streets*. The Applicant has submitted for the review of the County Transportation Division a sight distance certification from a registered traffic engineer, which provides an assessment of sight distance at the intersection in question consistent with AASHTO standards. Per the submitted site distance analysis, sufficient site distance was found in both directions for safe and efficient operation of the site access. The study finds that vegetation near the access has to be cleared to provide a minimum of 350 feet of sight distance in the eastern direction. A condition has been added to reflect this.

*As conditioned, the standard is met.*

## **MCRR 5.000 Transportation Impact**

**MCRR 5.100** To determine if a Transportation Impact is caused by a proposed development, the County Engineer will determine the number of new trips generated by a site by one of the following methods:

- A. Calculations from the most recent edition of the Institute of Transportation Engineers' Trip Generation (ITE); or
- B. A site development transportation impact study conducted by a professional engineer registered in the State of Oregon and accepted by the County.

**MCRR 5.200** The County Engineer will use the information obtained pursuant to sub-section 5.100 and/or the frontage length of the subject property to determine the pro-rata share of the requirements set forth in Section 6.000.

**MCRR 5.300** Except where special circumstances require the County Engineer to make an alternate determination, any new construction or alteration which will increase the number of trips generated by a site by more than 20 percent, by more than 100 trips per day or by more than

**10 trips in the peak hour shall be found to have a *Transportation Impact*. A minimum increase of 10 new trips per day is required to find a transportation impact.**

**Staff:** The Multnomah County Road Rules defines a Transportation Impact as the affect of any new construction or alteration which will increase the number of trips generated by a site by more than 20 percent, by more than 100 trips per day or by more than 10 trips in the peak hour [MCRR 3.000]. A minimum increase of 10 new trips per day is required to find a transportation impact.

According to the ITE Manual, 8<sup>th</sup> Edition, a single family dwelling generates 10 trips per day. The property is currently vacant. Therefore, a transportation impact will be caused by the proposed development since trips generated by the site will be increased by more than 20 percent.

**MCRR 9.000 Compliance Method**

**MCRR 9.100 Once frontage or off-site improvement requirements have been established, one or any combination of the following methods must be used to satisfy those requirements::**

**9.400 Non-Remonstrance Agreement:** This agreement shall be recorded in the County’s Deed Records against the affected property and “runs with the land”, thereby obligating the property owner and any successors in interest to share in the cost of the necessary improvements and to not remonstrate (object) against a petition or resolution for necessary improvements. In approving this method, the County Engineer may require a temporary improvement appropriate to the circumstances.

**Staff:** A non-remonstrance agreement, or “deed restriction” will require that the property participate in standard rural collector road improvements along the site’s frontage that are not completed as a part of the site’s required interim improvements. The Applicant is not, at this time, required to construct improvements, therefore a deed restriction is required.

*A condition has been added to require the deed restriction. As conditioned, this standard is met.*

**7.00 Conclusion**

Based on the foregoing findings and the record in this matter, the Applicant/Owner has demonstrated satisfaction of the standards and criteria, as proposed and with conditions of approval, for approval of a land use permit for a “dwelling customarily provided in conjunction with a farm use on not high-value farmland soils, capable of producing the median level of annual gross sales” pursuant to MCC 33.2625(D)(3), and for the associated Significant Environmental Concern-Wildlife Habitat and Hillside Development Permits.

**8.00 Exhibits**

- ‘A’ Applicant’s Exhibits
- ‘B’ Staff Exhibits
- ‘C’ Procedural Exhibits

Exhibits with a “\*” after the exhibit # have been included as part of the mailed decision. All other exhibits are available for review in Case File T2-2014-3377 at the Land Use Planning office.

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
A.1	1	General Application Form	4/01/2014

# RULES FOR NEW FARM DWELLINGS

## March 1994

On February 18, 1994, Oregon's Land Conservation and Development Commission (LCDC) made some important revisions to its administrative rules for "farm dwellings." Those revisions took effect on March 1, 1994.

This summary describes the revised rules. Their complete text appears in Oregon Administrative Rules (OAR) 660-33-135.

### What is the purpose of the farm dwelling rules?

The rules for new farm dwellings are designed to protect agricultural land in areas zoned Exclusive Farm Use (EFU). The rules serve as a kind of filter. They allow new homes for people who will operate commercial farms and ranches, but they screen out other types of housing that conflict with commercial agriculture.

### What is a farm dwelling?

A farm dwelling is a house or manufactured home located on a farm (or ranch) and occupied by a farmer — a person who is "principally engaged" in activities such as planting crops or raising livestock. State law (ORS Chapter 215) refers to such houses as "dwellings customarily provided in conjunction with a farm use."

A farm dwelling is *not* just any dwelling that happens to be in an EFU zone. Rather, it is one among several types of dwellings allowed in EFU zones.

The key to distinguishing farm dwellings from other types lies in the phrase "customarily provided." For example, a farm dwelling would not customarily be built on a dry five-acre parcel that provides just enough forage for one cow. Such a parcel doesn't demand the care and attention of a resident manager. It also could not support a farm household. In other words, it is not a farm — and without a farm, there can be

no "farm dwelling." Therefore, the main issue with any request to approve a new farm dwelling is likely to be this: "Is the tract of land on which the dwelling will be placed a farm?"

### What is a farm?

To be considered a farm, a tract first must be in "farm use." Oregon's land use laws define that term in ORS 215.203. The definition is quite broad. It includes almost every type of crop, orchard, and livestock production.

But just because a tract is in farm use does not mean it's a farm. Consider, for example, the five-acre parcel mentioned above. Raising cattle is a farm use, but the presence of one cow does not make the five-acre parcel a farm.

In contrast, consider a 500-acre tract with rich irrigated soils, producing hundreds of thousands of dollars of crops each year. This surely is a farm. Three main attributes distinguish it from the five-acre parcel that is not:

1. **Size** — The tract is large enough to demand the attention and labors of at least one household (the occupants of a farm dwelling). It includes enough farmland to make a significant contribution to the area's agricultural economy.
2. **Capability** — The tract has a combination of soils, water, and other features that makes it capable of producing significant amounts of crops or other farm products in the future.
3. **Income** — The tract already has produced significant amounts of agricultural products, as measured by its gross income from the sale of such products.

The rules for new farm dwellings are based on these three attributes. They enable planners to get a clear, objective answer to the question "Is this a farm, or is it merely land that is being farmed?" The table on the next page outlines the key standards and shows where they apply.



Department of Land Conservation and Development (DLCD)  
1175 Court Street NE, Salem OR 97310 • 503 373-0050

**How do the rules work?**

The state's rules for farm dwellings are applied through county land-use plans and ordinances. A person who wants to build a farm dwelling thus should contact the county planning department. The planners there will explain the rules and specify which standards apply to the tract where the dwelling is proposed.

The main issue in deciding which standards to apply is the quality of the tract's soil. If the tract is "high-value farmland," then it must satisfy the \$80,000 test. That is, a farm dwelling can be approved only if the tract has produced at least \$80,000 from gross sales of agricultural products in recent years. If the tract is not high-value farmland, then the proposal must satisfy any one of three different tests, as shown in the table below.

All counties must conform to the state's rules on farm dwellings, but they also may adopt special local provisions. The procedures and standards for farm dwellings thus vary somewhat from one county to another.

**What is high-value farmland?**

High-value farmland is land with exceptionally good soils. That includes soils rated as *prime*, *unique*, Class I, or Class II by the Soil Conservation Service (SCS). It also includes certain other soils listed in OAR 660-33-020(8). Most

high-value farmland is in the Willamette Valley.

To find whether a certain tract of farmland is high-value, a county planner uses data from the SCS. If a majority of land in the tract has the top-quality soils just described, then the tract is classified as high-value. A planner usually can perform the soils analysis at the permit counter, while the applicant waits.

**What about other dwellings?**

Farm dwellings are not the only type of houses allowed in EFU zones. For example, Oregon's planning laws have long provided for "nonfarm dwellings" in farm zones. With House Bill 3661, the 1993 Legislature added provisions for dwellings on "lots of record." LCDC's recent revisions to the rules for farm dwellings do not alter or eliminate any provisions from House Bill 3661 or for other types of dwellings.

**For more information . . .**

For more information about farm dwelling permits and procedures, contact your county planning department. For general information on Oregon's rules for planning and zoning farmland, contact DLCD's Salem office at the address shown on the preceding page. Or call your nearest DLCD field representative, in Bend (388-6424), Newport (265-8869), or Portland (731-4065). ■

STANDARDS FOR NEW FARM DWELLINGS IN EFU ZONES			
TYPE OF TEST	TYPE OF FARMLAND		
	High-Value Farmland (All Counties)	Farmland That Is Not High-Value	
		In Most Counties	In "Marginal Land" Counties
<i>Parcel Size</i>	—	At least <u>160</u> acres (320 for rangeland)	—
<i>Production Capability</i>	—	Can produce gross sales ≥ median of commercial farms	—
<i>Income</i>	\$80,000	<u>40,000</u> or median of commercial farms	\$20,000