

June 4, 2021

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VIA E-MAIL

Mr. John Ingle, Chair
Multnomah County Planning Commission
1600 SE 190th Avenue
Portland, OR 97233

RE: PC-2021-14207
Proposed Repeal of MCC 39.2465(B)(3)

Dear Chair Ingle and Planning Commissioners:

This office represents Mr. Scott Reed, owner of Springwood Acres Farm at 12460 NW Springville Road. The farm consists of approximately 84.43 acres. Since starting the farm in 2013, Mr. Reed has changed the long-neglected property into a vibrant and successful enterprise, which now includes substantial livestock and poultry operations.

Since 2013, Mr. Reed has sought to build a dwelling pursuant to MCC 39.4265(B)(3) (“subsection (B)(3)”), the provision which the County seeks to eliminate through the proposed “housekeeping amendment.” Despite obtaining approval under subsection (B)(3) in 2015 and despite diligently seeking permits and even digging the foundation, the County has recently taken the position his land use approval is no longer valid. The County now seeks to eliminate his remaining pathway to the home he and his family have worked so hard for over the last decade. For this and other reasons explained in more detail below, Mr. Reed strongly opposes elimination of MCC 39.4265(B)(3).

1. What is MCC 39.4265(B)(3)?

Before explaining Mr. Reed’s reasons for opposing this text amendment, we seek to aid the Commission by explaining what MCC 39.4265(B)(3) is and how it works. Oregon’s land use laws provide a dizzying array of tests by which farm and non-farm dwellings in exclusive farm use zones can be established. Subsection (B)(3) implements an administrative rule adopted by the Oregon Land Conservation and Development Commission (LCDC), OAR 660-033-0135(2) (the “median gross annual sales test”). The median gross annual sales test allows an owner of non-high value farmland to obtain a dwelling if the owner’s tract meets the following criteria:

- It is as least as large as the median tract size of commercial farm or ranch tracts capable of generating at least \$10,000 in annual gross sales within one mile of the owner’s tract.

- It is at least 10 acres.
- It is capable of producing the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the minimum tract size, above.
- It is employed for farm use or will be so before a building permit issues.
- There is no other dwelling on the property and the new dwelling will be occupied by a person principally engaged in a farm use.

In order to determine the median level of annual gross sales, the administrative rule provides a methodology by which local governments, with assistance from the Department of Land Conservation and Development Department (“DLCD”) staff, calculate the “median level of annual gross sales of county indicator crops.” County indicator crops are determined by using “the most recent OSU Extension Service Commodity Data Sheets, Report No. 790, “Oregon County and State Agricultural Estimates, or other USDA/Extension Service Documentation.”

This analysis is neither impossible nor especially difficult; Mr. Reed was able to work with County staff and DLCD to conduct it successfully in 2015. It does not require *current* data, only the “most recent” data. Furthermore, DLCD is required by the administrative rule to assist the County in conducting this analysis. As a practical matter, applicants provide a substantial amount of effort in conducting the analysis because they have, as in all land use application, the burden of proof.

2. Elimination of MCC 39.4265(B)(3) is not a “housekeeping amendment.”

Subsection (B)(3) is a property right, just like any other land use allowance in the EFU zone. Its wholesale removal is not a housekeeping amendment – it permanently reduces the range of things that those owning EFU parcels with non-high value soil can do with their land. Because the County has taken the position that Mr. Reed’s prior house approval has expired, Mr. Reed will likely need to apply under (B)(3) again to reinstate his approval. Emails provided by County Staff (**Exhibit 1**) indicate that at least one other potential applicant inquired about making an application under this provision. We do not see how Staff’s attempt to get ahead of these and other future applications by eliminating (B)(3) is mere “housekeeping.” Rather, it should be carefully evaluated based on input from those it affects through a *bona fide* planning process, as explained below.

3. Elimination of MCC 39.4265(B)(3) is bad planning policy and premature.

The purpose of Exclusive Farm Use zoning in Oregon is to preserve family farms, which necessarily include two ingredients: a farm and a farmhouse. In its Comprehensive Plan, the County adopted a policy of allowing farm dwellings “as permitted in Oregon Statute and

Administrative Rules.”¹ Subsection (B)(3) is in the OARs and in the MCC for a good reason: it allows newer farmers to establish both a farm and a dwelling on a farm parcel that, due to soil quality or size, may not be able to meet the more stringent income tests required for high-value farmland. This allows more less-valuable farmland to be put into production and allows aspiring farmers to establish their own family farms.

The Staff Report makes no effort to address this policy issue in even cursory terms. To our knowledge, the County has never consulted the Multnomah County Farm Bureau, the West Multnomah County Soil and Water Conservation District, or the Oregon Farm Bureau to determine whether elimination of this land use right is good for farming or good for landowners. Staff did not consult Mr. Reed to determine the potential impacts on his likely need to file a new application. As noted above, we understand that at least one other person had begun exploring with staff the possibility of using (B)(3) to obtain a dwelling authorization, and it is not clear whether staff consulted that person about this upcoming change, either. Staff also has apparently not considered the alternative solution of working with DLCD to make the median gross annual sales test more user friendly. It is simply bad land use planning practice to eliminate this family farm opportunity without seriously engaging those whom it has helped or those whom it could help, especially those, including my client, who may seek to file a new application under (B)(3).

4. Elimination of MCC 39.4265(B)(3) should not be done simply because few people use it and should not be done because someone is interested in using it.

The Staff Report argues that it will be “difficult for staff to provide guidance to applicants or otherwise implement this provision.” Presumably, this is because certain data sets regarding farm income are not updated as frequently as staff would prefer. But, under OAR 660-033-0135(2)(c)(A), the County need only use “the most recent” data from the OSU Extension Service Commodity Data Sheets or other USDA/Extension Service documentation. There is simply no credible argument that is impossible or even overly difficult for the County to implement subsection (B)(3) with data already available to it.

Email correspondence between staff and DLCD staff undermine staff’s contention that subsection (B)(3) must be removed. As detailed in **Exhibit 1**, staff’s interest in eliminating subsection (B)(3) was prompted by an inquiry of someone who might use it. “While we have an interested party, they have not yet submitted an application. I will be discussing options on our end to remove this provision.” Staff’s concern was also that “we could potentially be risking that they deem their application complete if it takes too long for us to update our study.” However, DLCD staff never stated in this correspondence that the County could not conduct the (B)(3)

¹ According to Multnomah County Comprehensive Plan Section 3.10, the County must “allow...residences, on Exclusive Farm Use Lands as permitted by Oregon Statutes and Administrative Rules, with additional development standards and lot aggregation requirements to ensure protection of agricultural and natural and environmental resources.” Not allowing farm dwellings otherwise allowed under the OARs would violate this Comprehensive Plan provision.

analysis in compliance with the law; as Mr. Gordon Howard of DLCD explained “I see no reason why you can’t use the methodology set forth in your current code to consider a farm dwelling application.”

Mr. Howard did suggest that DLCD “will be looking at the possibility of removing this methodology from our existing administrative rules within the coming year.” However, this has not been done and regardless, Mr. Howard does not write the rules; LCDC does. Such a casual statement is no basis for the County to preemptively remove a property right that Mr. Reed and at least one other landowner may wish to rely upon. Staff’s apparent haste in doing so belies any pretention that this proposal has undergone a considered land use planning process.

Staff’s preference to not approve a new dwelling under subsection (B)(3) is simply not a relevant test for whether a longstanding property right should be eliminated, especially when citizens who might be able to benefit from this provision have never been consulted. At any rate, any suggestion that section (B)(3) places too many administrative burdens on staff is simply wrong: there is no evidence that consideration of applications under subsection (B)(3) takes up an inordinate amount of staff time, or any substantial staff time at all. It takes no work to allow a property right to remain in the MMC; Mr. Reed and other potential applicants, including the one currently looking into using this provision to construct a dwelling, should be able to make their case. And, it is reasonable assume that such an application process will help generate the very data the County believes is lacking.

5. Elimination of MCC 39.4265(B)(3) would likely prejudice Mr. Reed’s ability to complete his home.

This proposed amendment is the latest setback suffered by Mr. Reed in his ongoing effort to build his family home. Mr. Reed made an application under subsection (B)(3) in 2014 and, after satisfying every staff request for information, after working with DLCD to conduct the gross income test required by subsection (B)(3), after working with West Multnomah County Soil and Water district to create a farm plan, and after turning over countless receipts and invoices to prove up the potential farm income of his land, Mr. Reed was nonetheless forced to sue the County in circuit court to force it to approve his application.

Since then, a number of delays in County and City of Portland permitting review have substantially hampered Mr. Reed’s project, to the extent that he may need to re-apply for his 2015 approval. After finally obtaining his approval in late 2015, Mr. Reed went about designing his home and filing the building plans and a grading permit. He initially filed his building plans to Multnomah County in late 2015, which the County did not release for submittal to the City of Portland until February 2018. Mr. Reed then submitted his plans to the City of Portland in March 2018. Mr. Reed began grading for his home in May 2018 under a County-approved permit and dug the foundation. After more delays in City permitting, the City gave notice in March 2020 that Mr. Reed’s permit was ready to issue but indicated that the County had placed an administrative hold on the permit. Less than one week ago and after an inquiry prompted by this legislative proposal, the County explained to Mr. Reed that its official position is now that

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his 2015 farm dwelling approval has expired and that he would have to submit a new application; this would most likely be under subsection (B)(3).

Despite his difficult experiences with County staff over the last six years, Mr. Reed is hesitant to impugn staff's motives. Assuming that removal of subsection (B)(3) this not part of a larger issue between Mr. Reed and planning staff—which premise we would prefer to accept—we would expect that staff would have no objection to delaying this legislative amendment until Mr. Reed is able to obtain a new approval under subsection (B)(3).

6. Conclusion and Request.

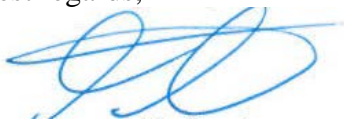
The legislative effort to remove subsection (B)(3) is brought before this Commission as “housekeeping amendment.” It is anything but. It removes an important property right on non-high-value farmland and does so without any meaningful outreach or policy consideration. It directly affects my client, whom staff knows to be interested in obtaining an approval under this section. Given this, the Planning Commission should take the following actions.

First, we request that the Planning Commission recommend denial of this text amendment and instruct staff to do a proper planning process to determine the potential impacts of eliminating subsection (B)(3), including directly engaging those whom this amendment may affect. This will allow all stakeholders to also work with DLCDC to see if the median gross annual sales test can be improved or otherwise streamlined to make it more user friendly.

Second, we request that if the Planning Commission does not decide on June 7 to recommend denial, that it continue the hearing on this matter to the next scheduled Planning Commission meeting to allow my client time to gather more facts regarding this proposed change and begin preparing a new dwelling application.

Thank you for your consideration of this testimony.

Best regards,



Garrett H. Stephenson

GST:jmhi
Enclosure

cc: Mr. Scott Reed (*via email*) (*w/enclosure*)

PDX\131873\229292\GST\31000245.1



Carol Johnson <carol.johnson@multco.us>

RE: Gross sales study

1 message

Howard, Gordon <gordon.howard@state.or.us>

Fri, Apr 16, 2021 at 5:16 PM

To: Carol Johnson <carol.johnson@multco.us>, "Howard, Gordon" <gordon.howard@state.or.us>, "Foote, Hilary" <hilary.foote@state.or.us>, "Donnelly, Jennifer" <jennifer.donnelly@state.or.us>

Yes. Have a great weekend!

Gordon

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Carol Johnson <carol.johnson@multco.us>

Date: 4/16/21 4:26 PM (GMT-08:00)

To: "Howard, Gordon" <ghoward@dlcd.state.or.us>, "Foote, Hilary" <hfote@dlcd.state.or.us>, "Donnelly, Jennifer" <jdonnelly@dlcd.state.or.us>

Subject: Re: Gross sales study

Hello Gordon,

Thank you for responding so quickly. I was told that you had previously been in our long range section, and you are correct in the fact that those area plans have not been updated. I would love to convince our elected officials to support some additional positions in our long-range division so that we can do more community based planning.

I am checking for understanding of your response, so please let me know if I am understanding correctly. Technically, the County did not need DLCD review and approval of our Potential Gross Income study, and as such we can use that 2014 study for our anticipated application while we work as quickly as possible to delete this provision from our code. Am I understanding correctly?

Thank you,
Carol

Carol Johnson, AICP

Land Use Planning Director

Multnomah County

Land Use Planning Division

1600 SE 190th Avenue, Suite 116

Portland, OR 97233

desk: 503-988-0218

mobile: 971-280-3743

carol.johnson@multco.us

pronouns: she/her/hers

----- Forwarded message -----

From: **Howard, Gordon** <gordon.howard@state.or.us>

Date: Fri, Apr 16, 2021 at 3:37 PM

Subject: RE: Gross sales study

To: Carol Johnson <carol.johnson@multco.us>

Cc: Foote, Hilary <hilary.foote@state.or.us>, Donnelly, Jennifer <jennifer.donnelly@state.or.us>

Hi Carol, I hope to meet you some day. You may know that I worked as a planner for Multnomah County back many, many years ago, from 1993 to 1997! I was the project manager for the Sauvie Island/Multnomah Channel, West Hills, and East of Sandy River Rural Area Plans, which may or may not have been updated since then.

Regarding your question, as I read our rules in OAR 660-033-0135 there isn't any provision for us to "authorize" your use of the OSU extension report information – the language in the rule says to use the "most recent" information, which now dates back to 2012. I believe that our previous farm and forest specialist was unofficially "authorizing" use of the method, and given the fact that it is stale and getting staler, we would recommend that you not use the method and remove the methodology from your development code provisions for farm dwelling applications. But I see no reason why you can't use the methodology set forth in your current code to consider a farm dwelling application until you remove the language from your code.

Given the fact that Oregon State University is no longer compiling this data, we will be looking at the possibility of removing this methodology from our existing administrative rules within the coming year, which would make continued presence of it in your code non-operational. So I would recommend that you go ahead and remove the methodology from your existing code as soon as is feasible.

Gordon Howard

Community Services Division Manager

Oregon Department of Land Conservation and Development

635 Capitol Street NE, Suite 150 | Salem, OR 97301-2540 | Cell: 503-856-6935 | Main: 503-373-0050

gordon.howard@state.or.us | www.oregon.gov/LCD



From: Carol Johnson [mailto:carol.johnson@multco.us]

Sent: Friday, April 16, 2021 9:35 AM

To: Howard, Gordon <goward@dlcd.state.or.us>

Subject: Fwd: Gross sales study

Hello Gordon,

I haven't had the pleasure of making your acquaintance yet. I started at Multnomah County on December 31st of 2019, and 2 1/2 months later we all know what happened. As a result, I haven't been able to get to know the extended planning community in Oregon.

I really value the work that Hilary and Jennifer do to support us here in Multnomah County. I am dealing with a time sensitive issue that is somewhat explained in the email below. At Hilary's suggestion, I reached out to David Losh at USDA about identifying the equivalent data that used to be provided in Report 790. He shared that his program has been impacted by budget cuts and he does not feel that he is able to meet the requirements stated in the OAR.

<https://mail.google.com/mail/u/0?ik=0aa24b317a&view=pt&search=all&permthid=thread-a%3Ar-8750381213660786310%7Cmsg-f%3A169724460123...> 2/9

I am wondering who at DLCDD might be able to address the request I made to Hilary that the 2014 study prepared by Multnomah County be reauthorized for a one time use by the applicant who has been waiting to submit? We will be processing a code amendment to delete this discretionary provision, but we won't have completed that process before the applicant is able to submit. Would you be able to make this decision?

Thank you,

Carol

Carol Johnson, AICP

Land Use Planning Director

Multnomah County

Land Use Planning Division

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desk: 503-988-0218

mobile: 971-280-3743

carol.johnson@multco.us

pronouns: she/her/hers

----- Forwarded message -----

From: **Carol Johnson** <carol.johnson@multco.us>

Date: Mon, Mar 29, 2021 at 5:10 PM

Subject: Fwd: Gross sales study

To: Hilary Foote <hilary.foote@state.or.us>, Jennifer Donnelly <jennifer.donnelly@state.or.us>

Hi Hilary and Jennifer,

Multnomah County is mapping out a timeline for the deletion of the discretionary approval of a farm dwelling on non-high value soils which is codified in Multnomah County Code 39.4265(B)(3) as well as OAR 660-33-135(3). As I stated in my email of last Tuesday, we have a potential applicant that may submit an application before we are able to process the amendment.

As I shared in that email, since OSU Extension stopped publishing Report 790 in 2012 and with funding changes made at the federal level, it is no longer possible to produce the potential gross income test in compliance with OAR 660-33-135(3). As a result, I would like to know whether DLCDD would reauthorize the use of our previous study which includes the five year average of 2012, 2011, 2010, 2009 and 2008 in the event we receive such an application? This would be with the understanding that this would only be valid for one year while we delete this provision from our code.

Thank you,

Carol