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Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of **T3-2022-15860** issued and mailed **11/17/2022**. This notice is being mailed to those persons entitled to receive notice under MCC 39.1170(D).

The Hearings Officer's Decision is the County's final decision and may be appealed to the State of Oregon Land Use Board of Appeals (LUBA) by any person or organization that appeared and testified at the hearing, or by those who submitted written testimony into the record.

Appeal instructions and forms are available from:

Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, Oregon 97301

503-373-1265
www.oregon.gov/LUBA

For further information call the Multnomah County Land Use Planning Division at: 503-988-3043.

**BEFORE THE LAND USE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON**

In the Matter of an application for variance to the CFU-1 Forest Practices Setbacks, An Accessory Use Determination, Significant Environmental Concern Review for Wildlife Habitat and an Exemption from the Geologic Hazards Overlay for a new 2,375 sf accessory structure on a 42.58-acre parcel zoned Commercial Forest Use (CFU-1) in unincorporated Multnomah County, Oregon

FINAL ORDER

Moreland Road Accessory Structures

T3-2022-15860

I. Summary:

This Order is the decision of the Multnomah County Land Use Hearings Officer approving with conditions the following requests and related approvals on a 42.58-acre parcel zoned Commercial Forest Use (CFU-1) with a Significant Environmental Concern – Stream (SEC-s) and Significant Environmental Concern – Wildlife Habitat (SEC-h) overlay:

1. An Accessory Use Determination for a new 2,375 sf accessory structure (garage)
2. A lean-to addition to an existing accessory structure (well house);
3. A Significant Environmental Concern Review for Wildlife Habitat for the new 2,375 sf accessory structure (garage), and
4. An Exemption from the Geologic Hazards Overlay for the accessory structure.

II. Introduction to the underlying application and the Property:

Applicant.....Jon DeLeonardo
Quilici Architecture and Design
210 SW Morrison St., Suite 600
Portland, OR 97204

Owner.....Andrew Johnson
23141 NW Moreland Road
North Plains, OR 97133

Property Legal Description: Tax Lots 400 and 401 in Section 10, Township 2 North, Range 2 West of the Willamette Meridian, Alternative tax accts: R972100090 & R972100270, Property IDs: R325589 & R645027.

Applicable Laws Multnomah County Code (MCC) 39.1515 (Code Compliance and Applications), MCC 39.2000 (Definitions), MCC 39.3005 (Lot of Record – Generally), MCC 39.3020 (Lot of Record – CFU-1), MCC 39.4105 (Building Height, CFU-1), MCC 39.4110 (Forest Practices Setbacks & Fires Safety Zones), MCC 39.4115 (CFU-1 Development Standards), MCC 39.6850 (Dark Sky Lighting

Standards), MCC 39.4070(T)(1) - (8) (Allowed Use, Accessory Structures), MCC 39.4075(L)(1) - (7) (Review Use, Accessory Structures), MCC 39.5520 (Application for SEC Permit), MCC 39.5860 (Criteria for Approval of SEC-h Permit – Wildlife Habitat), MCC 39.8205 (Variances, Scope), MCC 39.8215 (Variance Approval Criteria), MCC 39.5075 (Geologic Hazard Permits Required), MCC 39.5080 (Exemptions).

The two parcels involved in this matter are adjacent to one another and collectively constitute a single lot of record (the “Property”), 42.58 acres in size. A home was approved for the Property in 1987 (Land Use Case No. PRE 5-87) and has been inhabited ever since. While the Property is mapped Significant Environmental Concern for streams (SEC-s) and Geologic Hazard (GH) overlay, none of the structures at issue are on portions of the Property mapped for SEC-s or GH. In addition to a single-family dwelling, the Property is developed with a pool, pool house, a garden shed, pergola, and a well house. The existing development is located in a cleared area, but the remainder of the Property is densely forested. A portion of Jackson Creek is located on the east side of the Property in the forested area but is unaffected by this proposal. The present application involves the following two accessory structures:

(1) A retroactive approval for a lean-to addition to the Property’s well house. The well was installed in 1971. The well house is farther from the main dwelling than 100 feet, which would implicate a 130-foot primary and secondary Fire Safety Zone that cannot be met. The Secondary Fire Safety Zone would not apply if the lean-to is considered an addition to an existing lawful structure; otherwise, the enlarged structure requires a variance to the 130-foot Secondary Fire Safety Zone.

(2) Approval for a new 2,375 sf accessory structure, which will be used basically as a garage. This structure is within 100 feet of the primary, meets the 100-foot Primary Fire Safety Zone and is not subject to the larger Secondary Fire Safety Zone. This accessory structure does trigger review for the applicable Significant Environmental Concern Review for wildlife habitat and an exemption from the Geologic Hazards overlay.

The application was filed June 9, 2022 (Ex. A.1), along with a narrative describing all of the approvals needed (Ex. A.2), a site plan (Ex. A.3) and supporting documentation about the two accessory structures and the Property generally. The County followed a Type III process, and once the application was complete on July 8, 2022 (Ex. C.1), issued notice of the proposal and an October 14, 2022 public hearing (Ex. C.2). No comments were received on the proposal, and planning staff issued an October 7, 2022 report on the proposal (Ex. C.3) that analyzed the applicable approval criteria and generally found the proposal approvable, subject to conditions.

The October 14 2022 hearing was held remotely via a Zoom internet platform, in which everyone participating via video or via telephone audio could testify and could hear everything that everyone said. At the commencement of the hearing, the Hearings Officer made the disclosures and announcements required by ORS 197.763(5) and (6) and 197.796 and disclaimed any *ex parte* contacts, conflict of interest or bias. No one raised any procedural objections or challenged the Hearings Officer’s ability to decide the matter impartially, or otherwise challenged the Officer’s jurisdiction. No one requested that the record be left open or that the hearing be continued.

At the hearing, Isabella Liu, Land Use Planner for the County, provided a verbal summary of the October 7th staff report. The applicant (Jon DeLeonardo) and owner (Andrew Johnson) appeared to explain some of the background and details about the project and to generally advocate for approval. The owner complained that he had not received a copy of the staff report; although, it had been publicly released 7 days prior to the hearing as required by ORS 197.797(4)(b). Mr. Johnson initially asked for a one-week open record, but during the course of the hearing he was able to digest the staff report and withdrew his open-record request. No one else requested the opportunity to testify, and no new written comments were received into the record. At the hearing's conclusion, the Hearings Officer closed the record.

III. Findings:

Only issues and approval criteria raised in the course of the application, appeal, during the hearing, or before the close of the record are discussed in this section. All approval criteria or issues not raised by staff, the applicant or a party to the proceeding have been waived as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Hearings Officer finds those criteria to be met, even though they are not specifically addressed in these findings. The Hearings Officer adopts the following findings related to the issues and approval criteria that were preserved during the local proceeding while the record was open:

A. The Accessory Structures:

1. MCC 39.1515 Code Compliance and Applications. MCC 39.1515 prohibits the County from issuing or otherwise approving permits for any property that is not in full compliance with all applicable provisions of Multnomah County Zoning Code. As written, this provision could be construed to impose an impossible burden on every applicant to prove a negative – to prove there is nothing about the property and all uses thereon that is contrary to the Zoning Code or any previously issued permit. Staff takes the position in the report (Ex. C.3) that MCC 39.1515, in fact, does not impose such a burden on applicants, but only requires that an applicant respond to any specific allegations or known instances of a violation on the property. Absent any argument to the contrary, I accept staff's interpretation and note there is no evidence or allegation of a code violation in this record, which is apparently enough to satisfy this provision.
2. MCC 39.3005 & 39.3020 Lot of Record. MCC 39.3005 and 39.3020 require the applicant to provide documentation that the subject parcel is a legal lot of record. Staff reports the Property (TLs 400 & 401) was the subject of a dwelling permit in 1987 (Land Use case PRE 5-87). The Property's configuration has not changed since that approval, and the Property remains a Lot of Record. Therefore, these requirements are met.
3. MCC 39.4070 – Allowed Uses in the CFU-1 Zone. MCC 39.4070(T)(1) allows, among other things, "garages or carports" and "pump houses" in the CFU-1 Zone, which means both requested accessory structures are allowed. The well pump house does not have a prior or express approval, but the well was installed in 1971 and is located more than 100 feet from the house. With the lean-to attachment, the structure is 880 sf in area and used for the well, related pump equipment and storage

of firewood. The applicant seeks retroactive approval for the existing well house building now that the attached lean-to has been constructed. The applicant also proposes a new 2,375 sf accessory building to store farm equipment – basically a “garage” within the meaning of MCC 39.4070(T)(A)(a). The garage building is proposed to be located within 100 feet of the existing dwelling (Ex. A.7). The existing well house does not meet all the Allowed Use standards, but the applicant seeks an Accessory Use Determination under MCC 39.4075, which is addressed below.

4. MCC 39.4070(T) – No dwelling use of either accessory structure. MCC 39.4070(T)(2), (3), (4) & (5) collectively prohibit use of an accessory structure for dwelling purposes, and toward that end prohibit more than one story, cooking facilities, a toilet, bathing facilities, a bed mattress or other sleeping fixtures, and a closet built into a wall. The existing well house is one story. It does not have any cooking facilities, no toilet, no bathing facilities, no closets and no sleeping items. The proposed accessory garage building shows a single story. No cooking facilities, restroom, bathing facilities, sleeping facilities or closets are shown on the floor plan (Ex. A.7). From this, I conclude the record adequately establishes that neither accessory structure can or will be used for a dwelling, and a condition is included pursuant to MCC 39.4070(5) and 39.8860 requiring a covenant prohibiting use of either structure as a dwelling. See Condition 3d.
5. MCC 39.4070(T)(6) – Maximum of 2,500 sf. for all accessory structures. MCC 39.4070(T)(6) limits the combined footprints of all accessory buildings on a lot of record to a total maximum of 2,500 sf. The site plan (Ex. A.7) shows a 130 sf garden shed, a 330 sf pool house, and a 1,152 sf expanded well house, with a current total of 1,612 sf for all accessory structures. This application proposes to add a new accessory structure (garage) at 2,375 sf, which will bring the grand total to 3,987 sf, which is 1,487 sf more than the maximum (2,500 sf) allowed by MCC 39.4070(T)(6). However, “[s]tructures or uses customarily accessory or incidental to any use permitted or approved in the CFU, which do not meet the ‘accessory structures’ standard in MCC 39.4070 Allowed Uses” may be allowed if they meet the requirements in MCC 39.4075(L)(2). MCC 39.4075(L)(2), in turn, basically repeats the same prohibitions in MCC 39.4070(T)(2), (3) & (4) against use of either accessory structure as a dwelling and the inclusion of the basic facilities needed to use the structure as a dwelling. For the reasons stated in the preceding section, neither accessory structure can or will be used for a dwelling, and a condition is included pursuant to MCC 39.4070(5) and 39.8860 requiring a covenant prohibiting use of either structure as a dwelling unit. See Condition 3d. This meets the requirements in MCC 39.4075(L)(2), which resolves the project’s exceedance of the 2,500 sf maximum accessory structure area limitation in MCC 39.4070(T)(6).
6. MCC 39.4075(L)(6) – The minimum departure from the standard. MCC 39.4075(L)(6) provides the final criterion, that “building features or combined building footprints exceeding [2,500 sf] are the minimum possible departure ... to accommodate the use.” As just described, the Property is developed with a pool house, a garden shed, and well house with an attached lean-to that total 1,612 sf. The applicant proposes a new 2,375 sf accessory structure and retroactive approval for the existing 1,152 sf well house. The total combined footprint of all accessory buildings will be 3,987 sf, which exceeds the 2,500 sf limit by 1,487 sf (Ex. A.3). The proposed floor plan (Ex. A.7) shows how the owner plans to use the garage to store the various pieces of equipment, all of which he currently owns and needs to store

(Ex. 2). Although the need for indoor storage may seem flimsy or at least a self-imposed hardship, even if true, those are not considerations under MCC 39.4075(L)(6). Given the applicant's arguments of how he "needs" a 2,375 sf garage to store his equipment, the Board has basically provided a standardless criterion. In the absence of any argument or evidence to the contrary, I conclude that the floor plan shows how the garage will be used to store equipment the applicant already owns and needs to store indoors. On that basis, the exceedance of the 2,500 sf of total accessory structure area is (barely) made acceptable pursuant to MCC 39.4075(L)(6), or at least not violated. I doubt, however, that any further accessory structures can be justified on this Property.

7. Conclusions Related to Accessory Structures. Based on staff's review and favorable recommendation (Ex. C.3), I conclude the applicant's narrative/justification (Ex. A.2), site plan (Ex. A.3) and the documents in the record related to property deed records and building permit information are sufficient to validate the new accessory structure (the garage) and retroactively allow the well house accessory structure. Subject to the conditions referenced herein, both accessory structures are approved at their current sizes.

B. Forest Practices Setbacks and Fire Safety Zones.

1. MCC 39.4110 - Forest Practices Setbacks and Fire Safety Zones. This section requires a 30-foot primary fire safety zone when an accessory structure is within 100 feet of the dwelling, and a 130-foot secondary fire safety zone when the accessory structure is farther than 100 feet from the dwelling. In this case, the larger accessory structure (the garage) is within 100 feet of the house, so only a 30-foot primary fire safety zone is required for the new garage structure. If the well pump house is deemed to be a new accessory structure, Table 1 in MCC 39.4110 requires a 130-foot secondary fire safety zone because it is farther than 100 feet from the dwelling, which cannot be met without a variance or exception. If the well house is deemed to be preexisting and nonconforming, with the lean-to being simply an addition to an existing lawful structure, Table 1 allows a Forest Practice Setback of less than 30 feet to the property line. In that case, Table 1 also prescribes a primary fire safety zone of only 30-foot. The site plan shows that both accessory structures meet the 30-foot primary fire safety zone and forest practices set back (Ex. A.3), but that assumes the well pump house is preexisting, and the lean-to is just an addition.

The first question is whether the well house is preexisting or a new structure. The well house presumably dates to the time the well was first installed in 1971 (Ex. B.6). The applicant asserts and logic suggest that some sort of well house structure was constructed at that time, has existed for decades, and is lawful and preexisting. There is no evidence or argument to the contrary, and staff takes a neutral position on the question (Ex. C.3). From this evidence, I conclude that the lean-to is simply an addition to an existing structure that predates the current requirements and is not a new structure. Therefore, the 30-foot primary fire safety zone applies to both accessory structures, which can be met in this case (Ex. A.3). The well pump house's existing (nonconforming) Forest Practices Setback and primary fire safety zone of 30 feet is satisfactory.

2. Slopes. The next question relates to slopes around both structures, which according to MCC 39.4110(D)(1)(b) requires the primary fire safety zone to be increased for

accessory structures where the slopes exceed 10%. In this case, the narrative (Ex. A.2) and topographic survey (Ex. A.4) indicate that slopes within the primary fire safety zone around the new accessory structure (the garage) may exceed 10% on the east side, ranging from 13% to 16%, and on the north side of the well house structure. Based on this record, it is not possible to make this determination definitively. Therefore, a condition of approval is warranted requiring the applicant to either (1) regrade a larger level pad within the primary fire safety zone surrounding each structure to not exceed 10% slope, or (2) increase the primary fire safety zone by 50 feet where the slopes exceed 10% in accordance with the table in MCC 39.4110(D)(1)(b). See Condition 4c.

3. Conclusions related to Forest Practices Setbacks and Fire Safety Zones. Based on staff's review and favorable recommendation (Ex. C.3), the applicant's narrative/justification (Ex. A.2), site plan (Ex. A.3), and topographic plan (Ex. A.4), I conclude that the well house qualifies as an existing structure and its setbacks and fire safety zone dimensions are nonconforming. Consequently, both accessory structures shall comply with the 30-foot primary fire safety zone and Forest Practices Setback. Those setbacks/buffers shall be increased on any side where the slopes within the setback/buffer is steeper than 10% or the applicant shall grade within the setback/buffer to bring those slopes below 10%. The applicant shall maintain these setbacks/buffers in perpetuity. See Condition 4c.

C. Other Miscellaneous Standards and Requirements.

1. MCC 39.6850 – Dark Sky Lighting Standards. This section imposes a variety of requirements on all new exterior lighting fixtures and how they are installed and adjusted. The application, however, contains no lighting details for the new accessory structure or the well house. A condition of approval, therefore, is warranted to ensure compliance with these clear and objective requirements. See Condition 4a.
2. MCC 39.4115(B) – Locational Requirements and Impact on Resource Uses. MCC 39.4115(B) regulations apply to three categories of structures, none of which appear to be at issue in this application:
 - (1) "new dwellings;" and
 - (2) "restored or replacement dwellings greater than 100-feet from an existing dwelling," and
 - (3) "accessory buildings (or similar structures) greater than 100-feet from the existing dwelling."

This case does not involve a new dwelling, nor does it involve a restored or replacement dwelling. The only accessory structure in this proposal that is more than 100 feet from the dwelling on this site is the well house. Given my conclusions that the well house lean-to is lawful, preexisting and therefore has nonconforming status, the addition to that existing nonconforming accessory structure does not appear to be one of the situations that triggers this section. Even if MCC 39.4115(B) has any relevance to the present application, Subsection (1)(a) simply repeats the Forest Practices Setbacks previously addressed and resolved.

Subsection (1)(b) requires the structure to be located in a cleared area of at least 10,000 sf. This site is heavily forested except for a ~0.32-acre area where all of these structures exist (Ex. A.3). Located within this cleared area, both the new

accessory and the existing well house comply with this requirement and the siting standards for the SEC-h overlay zone discussed below. Existing setbacks for this existing structure and its new addition are sufficient according to Table 1 in MCC 39.4110.

Subsection (1)(c) requires the “entirety of the development” to occupy a cleared area no larger than 30,000 sf, which this situation does not meet because the cleared area appears to be ~3 acres in size (Ex. A.3). However, given the three triggers for MCC 39.4115(B) described above, I am hard-pressed to conclude that MCC 39.4115(B) applies to this situation, notwithstanding, the “entirety of the development” language in Subsection (c). Nonetheless, staff takes the position that the provision applies (Ex. C.3, p. 15), is not met, and the applicant seeks a variance to the provision through the SEC-h review discussed below, which is the accepted avenue for such variances from the code standards that otherwise apply.

Subsection (1)(d) requires the structure to be sited “within 300 feet of frontage on a public road and the driveway from the public road to the structure is a maximum of 500-feet in length.” The existing well house is located 46 feet from the front property line along NW Moreland Road. Based on the applicant’s site plan, the existing driveway will be extended to the well house but the applicant did not provide a total length of the driveway. Staff measured the length of the driveway using the scale provided on the site plan (Ex. A.3), and concluded the proposed expansion of the driveway would exceed the 500-foot limit. Even though MCC 39.4115(B) does not appear to apply, and notwithstanding, the nonconforming status of the well house, staff takes the position that the provision applies (Ex. C.3, p. 16-17) and is not met. The applicant seeks a variance to the provision through a Type II SEC-h review discussed below, which again is the accepted avenue for such a variance.

Subsection (1)(e) requires that the local Fire Protection District verify that its fire apparatus can reach the structure using the proposed driveway. In this case, Tualatin Valley Fire and Rescue indicated that the location of the well house and the proposed accessory building will allow it to serve the building from Moreland Road (Ex. A.2). On this basis, even though MCC 39.4115(B) does not appear to apply, I conclude the criterion is met.

The applicability of MCC 39.4115(B)(2) suffers from the same problem as does MCC 39.4115(B)(1), in that MCC 39.4115(B) is only triggered by one of the three situations described above, and none appear to exist in this proposal. To the extent MCC 39.4115(B)(2) applies, it imposes several measures to ensure the protection of resource uses (forest and agriculture) and that the proposal has the least impact on resource uses. Subsection (2)(a) requires a finding that the proposal has “the least impact on nearby or adjoining forest or agricultural lands and satisfies the standards in MCC 39.4110.” The proposed accessory building is located in a lawn area ~69.5 feet from the existing dwelling and 44.83 feet from the front lot line adjacent to the public right-of-way (Ex. A.3). The primary fire safety zone and public right of way should protect the pasture to the west of Moreland Road from any impacts. The well house is located in a cleared area 46 feet from Moreland Road. The fire safety zones around the well house will help to limit any impacts or threats the structure may pose for the forested areas to the south. Additionally, the applicant requested a variance from the Secondary Fire Safety Zone for the well house. As described above in the section on Forest Practices Setbacks and Fire Safety Zones, I

concluded the requirements of MCC 39.4110 were met. Therefore, I also conclude the requirements of MCC 39.4115(B)(2) are met, to the extent Subsection (B) is even applicable.

Subsection (2)(b) requires that “adverse impacts on forest operations and accepted farming practices on the tract will be minimized.” Because no forestlands or agricultural lands on the property will be altered to site the new building or to retroactively permit the existing well house (Ex. B.6), this standard is met, to the extent it applies at all.

Subsection (2)(c) requires that “the amount of forest land used to site the dwelling or other structure, access road, and service corridor is minimized.” The area to be used to site the proposed accessory building, construct any roadway extension(s), and to retroactively permit the well house will not use any land presently under forest practices (Ex. B.6). this standard is met, to the extent it applies at all.

Subsection (2)(d) requires that, where any access road is longer than 500 feet, the applicant must show that the extension is “necessary due to physical limitations unique to the property and is the minimum length required.” The subject property has an existing driveway with a turnaround serving the dwelling, which will also serve the garage building and then be extended to the well house (Ex. A.3). Planning staff measured this from the scaled plan to be ~673.5 feet of driveway service corridor. The applicant’s narrative simply states that the driveway is less than 500 feet long (Ex. A.2), which may be true, except that the two segments combined exceed the 500-foot limit (Ex. C.3, p. 17). The narrative suggests that the segment from the new garage extending beyond the well pump house to Moreland Road is not a driveway with the following explanation:

“Please note the existing road around the perimeter of the site does not service either the pump house or the proposed new structure. It is a site access road for mowing and to provide access to the vineyard.”

This description, however, splits a definitional hair that the Code does not recognize. See MCC 39.2000 definition of “private driveway.” The driveway extending south from the proposed garage past the pump house, connecting to Moreland Road fits the definition of “private driveway.” When combined with the existing driveway, the new extension exceeds 500 feet. The applicant offers no explanation as to why the additional length is “necessary due to physical limitations unique to the property and is the minimum length required.” Accordingly, the additional new proposed driveway is not allowed and shall be removed from the site plan. A condition to this effect is warranted. See Conditions 4e & 6j.

MCC 39.4115(B)(3) provides several regulations designed to minimize the risks associated with wildfire related to access ways and requires local fire department review and sign-off. In this case, the applicant provided a Fire Service Agency Review signed by Tualatin Valley Fire and Rescue (Ex. A.11), which satisfies this requirement.

3. MCC 39.4115(C) – Building Permits and Fire Retardant Roof. Unlike its predecessors Subsections (A) and (B), MCC 39.4115(C) applies to “the dwelling or structure” and requires a building permit for stick-built structures, a fire retardant roof

and a spark arrester. While the application narrative does not focus on these points, conditions of approval are warranted to require these design features and that the applicant obtain building permits for all applicable construction. See Conditions 4b & 5.

D. Significant Environmental Concern Review.

1. MCC 39.5510 – SEC Permit Required. Some portions of this property are encumbered with the County’s Significant Environmental Concern Overlay for wildlife habitat (SEC-h), and for that reason must comply with the criteria in MCC 39.5860. Subsection (A) requires applications to include an area map showing all properties that are adjacent to or entirely or partially within 200 feet of the proposed development, with information addressing the criteria in this section. While the application did not include such a map, staff provided one, and it shows adjacent properties within 200 feet of the proposed development (Ex. B.5).
2. MCC 39.5860(B) – SEC-h approval criteria – Development Standards. Subsection (B)(1) requires that, where a parcel contains any non-forested or cleared areas, development shall only occur in these areas, except as necessary to provide access and to meet minimum clearance standards for fire safety. In this case, the existing and proposed development will occur on the non-forested area of the property. The applicant is not proposing to remove any trees for the proposed accessory structure, which satisfies this requirement.

Subsection (B)(2) requires that development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the site. In this case, the existing well house and the proposed accessory structure are located within 200 feet of NW Moreland Road (Ex. A.3), which meets this standard.

Subsection (B)(3) prohibits the access road/driveway and service corridor serving the development from exceeding 500 feet in length. The proposal (Ex. A.3) includes an existing driveway that serves the existing house and will serve the proposed garage. However, the plan includes a new/additional driveway extending south from the garage past the well house to Moreland Road, which when added to the existing driveway will exceed 500. Subsection (B)(3) prohibits the new/additional driveway because it exceeds the 500-foot limit. The applicant offers no explanation or justification for the over-length driveway except to suggest it is a different sort of accessway on the property. In truth, the segment extending south from the proposed garage, past the well pump house to Moreland Road is a “private driveway” that takes the total length of driveway over 500 feet without any justification. The proposed accessway extending south from the proposed garage is not allowed and shall be removed from the site plan. A condition to this effect is warranted. See Conditions 4e & 6j.

Subsection (B)(4) requires access road/driveway approaches to be clustered and offers two ways to accomplish this. First, 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. The adjacent property to the south of the well house has an access approach that is 480 feet from the shared property line

(Ex. B.5). No other property on the same side of the road has an existing access road or driveway within 200 feet of the shared side property boundaries, which achieves the first means of satisfying this requirement. Second, 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. Again, in this case, there are two driveway approaches on the subject property (Ex. B.5). The northern driveway is located directly across from the existing driveway on the opposite side of Moreland Road. The southern driveway is ~39 feet to the north of the driveway approach across the street. The applicant is not otherwise proposing to modify the driveway access, so I conclude this requirement is met.

Subsection (B)(5) requires development to 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. In this case, the only developed parcel is to the south on Moreland Road. Development on that lot is ~394 feet from the shared property line (Ex. B.5). The development on the subject property is not required to cluster with this neighboring development; therefore, this standard is satisfied.

Subsection (B)(6) limits road-side fencing to a maximum height of 42 inches with a minimum 17-inch gap between the ground and the bottom of the fence. Wood and wire fences are permitted, but the bottom strand of a wire fence shall be barbless. Fences may be electrified, except as prohibited by County Code. According to the applicant, the existing wood fence has a 17-inch gap between the bottom rail and the ground. The height of the fence is 42 inches (Ex. A.2), which satisfies this criterion. Cyclone, woven wire, and chain link fences are prohibited, as are fences with a ratio of solids to voids greater than 2:1. The applicant is not proposing a cyclone, woven wire, or chain link fence, and the existing fence is an open three rail natural wood fence (Ex. A.2).

Subsection (B)(7) prohibits planting any of the nuisance plants listed in MCC 39.5580 Table 1 and requires these plant species to be removed and kept removed from cleared areas of the subject property. A condition to this effect is warranted. See Condition 6i.

3. MCC 39.5860(C) – SEC-h approval criteria – Wildlife Conservation Plan. This subsection requires the applicant to propose a wildlife conservation plan if the project either cannot meet the development standards in Subsection (B) or the applicant can meet the Subsection (B) standards but demonstrates that alternative conservation measures exceed these standards and will result in a less detrimental impact on forested wildlife habitat than the Subsection (B) standards.

In this case, the applicant's proposal does not meet the basic development standards of MCC 39.5860(B) due to the collective length of driveway/service corridor on the site exceeding 500 feet. The applicant states that the original driveway leading to the existing dwelling is shorter than 500 feet, but staff measured the proposed driveway/service corridor expansion using the scale provided on the site plan and determined that the total driveway length exceeds 500 feet (Ex. A.3). The applicant offers no explanation or justification for the over-length access/driveway, which collectively meets the definition of "private driveway" in MCC 39.2000.

The application shall comply with the Subsection (C)(2) criteria because compliance is possible. The location of the proposed accessory structure is subject to the Forest Practice Standards and Fire Safety Setbacks. The proposed accessory structure will be located within 100 feet of the existing dwelling. This location is a non-forested cleared area, and it also allows the applicant to use and extend the existing access from NW Moreland Road. As the proposed accessory building is within 100 feet of the dwelling, it is clustered with it and needs only a primary fire safety zone. The existing well house is located to the south of the proposed new accessory structure (garage) and is farther than 190 feet from the dwelling. For these reasons, I find the applicant is proposing to build within an area that will have less detrimental impacts on forested wildlife habitat, which satisfies the fundamental requirements of MCC 39.5860(C).

E. MCC 39.8215 – Variance.

1. MCC 39.8215 – Variance Criteria. The applicant submitted a variance application for the well house accessory structure as a retro-active approval for a structure that has not otherwise been reviewed or approved by the County and does not meet all of the current development requirements. In particular the existing well housing accessory structure does not meet the 130-foot Forest Practice Setback applicable to accessory structures in the CFU-1 Zone that are more than 100 feet away from a dwelling. The County’s variance criteria require the applicant to demonstrate with credible evidence that (a) unusual circumstances apply to the property that justify the variance from a code requirement, (b) those circumstances are not self-imposed, but due to some physical attribute of the property, and (c) the applicant will suffer a practical difficulty or unnecessary hardship if the variance is not approved. The variance requirement, however, only applies if the well house is considered a new accessory structure. If instead, it is a preexisting nonconforming structure, then its current setbacks are similarly deemed nonconforming and no variance is needed for them to continue.

Given the uncertainty of this question, the applicant filed a variance request for the Forest Practice Setback deficiency. The applicant states that the existing physical improvements for the well casing cannot be relocated because the well casing is over 800 feet deep which would be a significant cost to the current property owners. The applicant also states that the existing well house is located within 130 feet of the centerline of Moreland Road, which provides the Tualatin Valley Fire and Rescue access to the structure in the event of a fire and is present in this location to cover the well casing. The applicant’s primary argument, however, is that compliance with the 130-foot Forest Practice Setback would require abandonment of the existing well, which is ~800 feet deep, and constructing a new one in a location that is at least 130 feet from any abutting property line.

The applicant requested a Variance from the Forest Practice Setbacks of the Commercial Forest Use-1 Zone for the existing well house that requires retroactive land use approval. The existing well house is located within a 0.32 acre clearing on a 42.58-acre parcel (Exs. A.2 & A.3), ~70 feet from the property’s south boundary. A new accessory structure located more than 100 feet from the existing dwelling requires a 30-foot setback from the front property line adjacent to the right-of-way, and a 130-foot setback from all other property boundaries. The record shows that permits were obtained for the well’s construction (Exs. B.6, B.7 & B.8). In 1971, the

property was zoned F2 and did not have setback requirements for a new structure, so the well's construction in this location was lawful at the time. While not clear from the record exactly when the well house was constructed, it was before the current owners purchased the property, and it is reasonable to assume it was constructed concurrently with or soon after the well was constructed.

This evidence is sufficient to convince me that the well, the well house, and the existing setbacks are nonconforming since they were established consistent with the then-applicable dimensional and spacing requirements and the local process, such as it was, and they retain a nonconforming status today. For that reason, no variance is needed from the Forest Practice Setbacks.

F. Geologic Hazards Overlay.

1. MCC 39.5075 – Applicability and Basic Requirements. The site is mapped with a Geologic Hazards Overlay, which triggers development limitations, but only if the specific development site is within the portion of the property mapped with Geologic Hazards Overlay or has slopes that exceed 25%. In this case, however, the location for all of the structures at issue in this application are outside the area mapped with Geologic Hazards Overlay. Moreover, the applicant's topographic survey confirms that none of these areas has a slope greater than 25% (Ex. A.4). On this basis, I conclude the Geologic Hazards Overlay requirements are satisfied as to this specific proposal.

IV. CONCLUSION AND DECISION:

Based on the foregoing findings, the applicant materials (the "A series" of exhibits), and staff's review and recommendation (Ex. C.3), I conclude this proposal meets the applicable approval criteria for the new accessory structure (garage) and the lean-to addition to the well house accessory structure. Except for the new portion of driveway extending south from the garage structure, which is not allowed, this proposal is approved subject to the following conditions, which shall be interpreted consistently with these findings. The conditions that follow are necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion is included. Approval of this land use permit is based on the applicant's submitted narrative, plans and all other representations made to the County. No work shall occur under this permit other than what is described in these documents and approved in this Final Order. While the property owners are responsible for compliance with these requirements and adhering to the limitations of approval described herein, these conditions may be fulfilled by the property owner's contractor(s), engineer(s) or other agents. Nonetheless, the property owners remain responsible for ensuring that these conditions are fully satisfied.

1. Approval of this land use permit is based on the submitted written narrative(s) and plan(s) and all other documents provided by or behalf of the applicant. No work shall occur under this permit except what is described in those documents. It shall be the responsibility of the property owner(s) to comply with these documents and the limitations of approval described herein. MCC 39.1170(B).
2. Permit Expiration – This land use permit shall automatically expire and be null and void upon the occurrence of either of the following two circumstances:

- a. Within two years of the date of this Final Order when construction has not commenced. MCC 39.1185(B).
 - i. For the purposes of 2.a, commencement of construction shall mean actual construction of the foundation or frame of the approved structure.
 - ii. For purposes of Condition 2.a, the developer shall provide notification of commencement of construction to Multnomah County Land Use Planning Division via email at *LUP-submittals@multco.us* a minimum of 7 days prior to date of commencement. The email must reference the case number, T3-2022-15860. Work may commence once notice is completed. Commencement of construction shall mean actual construction of the foundation or frame of the approved structure.
- b. Within 4 years of the date of commencement of construction if the structure has not been completed. For the purposes of Condition 2.b, “completion of the structure” shall mean completion of the structure’s exterior surfaces and compliance with all conditions of approval in the land use approval. For purposes of Condition 2.b, the property owner shall provide building permit status in support of completion of exterior surfaces of the structure and demonstrate compliance with all conditions of approval. The written notification and documentation of compliance with the conditions shall be sent to *LUP-submittals@multco.us*. MCC 39.1185(B).
3. Prior to land use sign-off for building plan check, the property owners or their representative shall complete/perform all of the following:
 - a. Record a copy of these conditions (pages 12 through 14) and a site plan, similar to Exhibit A.3 but reflecting the changes required by this Decision with the County Recorder. This Decision shall run with title to the land and bind the owner(s) and their successors in title to the land. The applicant shall provide proof of recording to the Land Use Planning Division prior to the issuance of any permits. Recording shall be at the applicant’s expense. MCC 39.1175.
 - b. The property owners shall acknowledge in writing that they have read and understand the conditions of approval and intend to comply with them. A form Letter of Acknowledgement has been provided to assist you. The signed document shall be sent to *isabella.liu@multco.us*. MCC 39.1170(A) & (B)
 - c. The property owners shall sign and record the following with County Records:
 - i. 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. MCC 39.4150
 - ii. The cover page of the hearings officer final decision and all pages containing conditions of approval; the approved Wildlife Conservation Plan; and the approved site plan with primary and secondary fire safety zones shown. MCC 39.1175
 - d. The property owner shall record a covenant with County Records that states that the owner understands and agrees that the well house accessory structure and garage accessory structure shall not be and cannot be occupied as a dwelling or used for any form of permanent or temporary residential use. MCC 39.8860.

4. At the time of land use sign-off for building plan check the property owners or their representative shall document they have met, fulfilled or complied with the following requirements:
 - a. Provide exterior lighting details for the proposed accessory building and well house to demonstrate all proposed exterior lighting complies with the Dark Sky Lighting Standards of MCC 39.6850. The locations of the proposed exterior lighting shall be shown on the site plan and building elevations. MCC 39.6850.
 - b. The accessory structures shall have a fire retardant roof and have a spark arrester on any chimney. MCC 39.4115(C)(3) & (4).
 - c. Demonstrate that the accessory buildings comply with the primary fire safety zone by either increasing it to extend farther down the slope on the southeast side of the structure in compliance with MCC 39.4110(D)(1)(b) or by modifying the terrain to be less than 10% within 30 feet of the buildings. MCC 39.4110(D).
 - d. Modify the site plan to show a primary fire safety zone for the well house in compliance with MCC 39.4110(D).
 - e. Modify the site plan to remove the access driveway extending south from the 2,375 sf accessory structure (the garage) past the well house to Moreland Road.
5. Final Building Permits (Portland). The owner shall obtain and final building permits from the City of Portland Building Department for the 2,375 sf accessory structure (the garage) and the well house addition. MCC 39.4115(C).
6. Ongoing conditions. The property owner and their successors shall maintain continuous compliance with the following:
 - f. The accessory structures shall not be used, temporarily or permanently, as a dwelling, accessory dwelling unit, apartment, guesthouse, housing rental unit, sleeping quarters or for any other residential use. MCC 39.4071(L)(1).
 - g. The accessory structures shall not contain a mattress, bed, Murphy bed, cot, or any other similar item designed to aid in sleep as a primary purpose, unless such item is disassembled for storage. MCC 39.4071(L)(5).
 - h. Required Primary Fire Safety Zones shall be maintained by the property owner for the 2,375 sf accessory structure (the garage) and for the well house accessory structure. MCC 39.4110(D)(5).
 - i. The nuisance plants in MCC 39.5580 Table 1 shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property. MCC 39.5860(B)(7).
 - j. There shall be no access driveway developed from the 2,375 sf accessory structure (the garage) south past the well house to Moreland Road without specific approval of the County.

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Date of Decision: November 17, 2022.



By: _____
Daniel Kearns,
Land Use Hearings Officer

Notice of Appeal Rights

This is the County's final decision on this application and appeal. Anyone with standing may appeal any aspect of the Hearings Officer's decision, to the Oregon Land Use Board of Appeals within 21 days of the date of this decision pursuant to ORS Chapter 197.

Exhibit List for T3-2022-15860

| Exhibit | Description of Exhibit | Date |
|----------------|---|-------------|
| A | Application Materials | |
| A.1 | General Application Form | 06.09.2022 |
| A.2 | Narrative | 06.09.2022 |
| A.3 | Site Plan | 06.09.2022 |
| A.4 | Topography | 06.09.2022 |
| A.5 | Elevation Drawings | 06.09.2022 |
| A.6 | Roof Drawing | 06.09.2022 |
| A.7 | Floor Plan | 06.09.2022 |
| A.8 | Additional Construction Plans | 06.09.2022 |
| A.9 | Well House Elevation Drawings | 06.09.2022 |
| A.10 | Well House Floor Plan | 06.09.2022 |
| A.11 | Fire Service Agency Review | 06.09.2022 |
| A.12 | Transportation Planning Review | 06.09.2022 |
| A.13 | Stormwater Drainage Control Certificate | 06.09.2022 |
| A.14 | Septic Review Certification | 06.09.2022 |
| A.15 | Retroactive Stormwater Drainage Control Certificate | 06.09.2022 |
| A.16 | Pre-Filing Meeting Notes | 06.09.2022 |
| B | Staff Exhibits | |

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|----------|--|------------|
| B.1 | Division of Assessment, Recording, and Taxation (DART): Property Information for 2N2W10A -00400 (Alt Acct# R972100090) | 06.09.2022 |
| B.2 | Division of Assessment, Recording, and Taxation (DART): Map for 2N2W10A - 00400-P1 (Alt Acct# R972100091) | 06.09.2022 |
| B.3 | Division of Assessment, Recording, and Taxation (DART): Map for 2N2W10A - 00401 (Alt Acct# R972100270) | 06.09.2022 |
| B.4 | Road Survey 1338 | 06.09.2022 |
| B.5 | Area Map | 06.09.2022 |
| B.6 | 2020 Aerial Photograph of Well house Location | 10.3.2022 |
| B.7 | Well Driller's Report | 10.4.2022 |
| C | Administration & Procedures | |
| C.1 | Complete Letter (Day 1) | 07.08.2022 |
| C.2 | Hearing Notice | 09.22.2022 |
| C.3 | Staff Report | 10.07.2022 |

Letter of Acknowledgement

For Case T3-2022-15860

I have read and understand the conditions of approval for my land use case, T3-2022-15860. I intend to comply with the conditions of approval and the land use decision. I understand that if I fail to comply with the conditions of approval within the time allotted by the permit, the County can institute code enforcement proceedings or take other actions as allowed under Multnomah County Code. [MCC 39.1170(B) & (C), MCC 39.1185]

PROPERTY OWNER

PROPERTY OWNER

Signature Date

Signature Date

(Print Name)

(Print Name)

(Print Mailing/Contact Address)

(Print Mailing/Contact Address)

(Phone Number)

(Phone Number)



CONDITIONS AND RESTRICTIONS

KNOW ALL MEN BY THESE PRESENTS THAT I _____
the Owner of the following described real property located in Multnomah County, Oregon to wit;

Recorded in (Book and Page or Instrument) _____, on _____ in the Multnomah County Book of Records, does hereby acknowledge on behalf of himself, his/her heirs, legal representatives, assigns and lessees by the placement of this covenant or the acceptance and recording of this instrument that the property herein described is situated in or adjacent to an agricultural/forest zone in Multnomah County, Oregon and as such may be subjected to common and accepted farming practices (as defined by ORS 215.203) or accepted forest practices (as defined by ORS 527.610 to 527.730) such as pesticide and herbicide spraying, weed cutting, slash burning, irrigating, field plowing, harvesting, and any other accepted farming or forest practice. Said practices above enumerated ordinarily and necessarily produce noise, dust, spray residue, smoke, vapor, and other types of visual, odor, or noise pollution, which grantee accepts as a normal and necessary farming or forest practice and as part of the risk of purchasing a residential dwelling in a farm or forest area.

Signature

Dated this _____ day of _____, 20_____

State of OREGON

County of _____

This instrument was acknowledged before me on _____, 20_____ by

Notary Public – State of Oregon