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1600 SE 190th Avenue, Portland OR 97233-5910 • PH. (503) 988-3043 • Fax (503) 988-3389

June 13, 2023

To: Alan Rapplelea  
Fr: Scot Siegel, Planning Director  
Re: **Scott Reed v. Multnomah County, LUBA No 2022-097 (Remand Proceeding)**  
**Multnomah County File T2-2021-14981**

A public hearing is scheduled on June 23, 2023 for the voluntary Land Use Boards of Appeals (LUBA) remand of T2-2021-14981 (LUBA No 2022-097). The remand concerns the key issues, below, that were identified in the appeal of the Planning Director decision and before LUBA. The full scope of the application includes permits for: A Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for Wildlife Habitat (SEC-h) permit, Erosion and Sediment Control (ESC) permit, and an exemption from Geologic Hazards Permit (GHP) requirements.

The County Attorney's Office and Appellant Scott Reed agreed to this voluntary remand based on the Appellant's assurance that they would provide substantial evidence of compliance with the applicable criteria. By accepting the voluntary remand, the County has agreed to consider new evidence on the following issues, and the Appellant maintains vesting under the Zoning Code in effect when the application was submitted (2021), including FORMER MCC 39.4265(B)(3) (2021), repealed by Ordinance 1304 (2022), Dwelling Customarily Provided in Conjunction with a Farm Use.

### **Key Issues on Remand**

#### Farm Dwelling Criteria

In the September 29, 2022 Notice of Hearings Officer Final Order, you find the Appellant did not meet the requirements for establishing a dwelling in conjunction with a farm use under FORMER MCC 39.4265(B)(3) (2021), due to lack of substantial evidence of **farm income** in the amount the code and

state law require. Although the Applicant had submitted a Farm Use Plan (Exhibit A.20), Farm Income Capability Study (2014) (Exhibit A.21), Updated Farm Management Plan (2020) (Exhibit A.25), Farm Aerial Photograph (1936) (Exhibit H.2.h), Affidavit of Farm Operator Scott Reed (Exhibit I.2), and Photo Documentation of Springwater Farm LLC (Exhibit H.2.u) including egg production, goat herd, pasture/hay cultivation, and farm-related equipment and structures (new barn and fencing), you found the application lacked sufficient financial documentation, sustaining the Planning Director's finding that MCC 39.4265(B)(3) (2021) was not met.

In the Final Order, you note that LUBA has found that “an Appellant simply testifying to their [farm use] production or sales is not substantial evidence to support a conclusion affirming the farm use. Friends of Marion County vs. Marion County (2022) [LUBA No. 2021-088].” You also note, “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.” (Hearings Officer Final Order, T2-2021-14891, page 12)

In the proceedings for this case, there is much testimony and deliberation on the sensitive nature of tax records, including statements by staff that data unrelated to the land use application such as personal information provided on a tax record could be redacted. Additionally, although it was not discussed in the prior hearing, submission of Schedule F is not the only means by which an applicant may demonstrate compliance with farm income test criteria. Other types of financial documentation may be accepted. For example, as an alternative to Schedule F, a financial statement prepared by a Certified Professional Accountant demonstrating sufficient farm income under the code could suffice.

The Appellant did submit farm production data for the remand hearing. It is contained in Exhibits R.2 (Egg Production by Month 2022), R.3 (Egg Production by Day 2022), and R.6 (Letter to County Deputy Attorney Blankfeld including egg sales data). The egg sales data is most relevant to the criteria, though the Appellant has not provided a Schedule F or other CPA certified document.

Based on the record and your prior findings, staff does not believe the criteria for a Dwelling Customarily Provided in Conjunction With (an Existing) Farm Use are met. If you find they are met, staff recommends imposing a condition of approval requiring the Appellant to submit Schedule F or

other certified financial documentation of required farm income that is acceptable to staff, prior to submission of building permits for a farm dwelling.

#### Significant Environmental Concern for Wildlife Habitat (SEC-h)

In the Post-Hearing Memorandum to the Hearings Officer (September 2, 2022), staff reviewed the applicant's Wildlife Conservation Plan and concluded that it was adequate to meet MCC 39.5860(C)(3). Staff concurs with the Appellant that for reasons that are not clear from the record, you did not address the SEC-h issue in your final decision. On remand, staff believes you can find that the standards for the SEC-h permit can be met, based on our review of the applicant's Wildlife Conservation Plan. (Exhibit H.2.k)

#### Geologic Hazards Permit (GHP)

The Appellant previously argued that the application meets the criteria for GHP exemption in MCC 39.5080. In your Final Order, you find that only exemption (O) may apply.<sup>1</sup> Exemption (O) is for: "Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces." Placement of asphalt on top of existing gravel without any other ground disturbance, you found, would qualify for exemption (O). (Exhibit H.3. page 31) You note, "If the application is refiled, and the access permit is reviewed and only asphalt is required over [the] existing driveway, ... Appellant may qualify for an exemption from the GH overlay."

The Appellant is requesting that you approve the exemption; or, alternatively, review their GHP Form-1 and find that it is feasible to obtain a GHP (Exhibit R.6, page 8). Previously, you found that a limited area of the property is in the GH overlay zone, and part of that area is where the proposed driveway is located. You also noted that the previous driveway permit expired and new criteria has been adopted by the County. (Exhibit H.1, page 5) Further, you noted that 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.)

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<sup>1</sup> "The Hearings Officer finds that the exemptions in subsection (N) do not apply because the property is located in the Tualatin River drainage." (Hearings Officer Final Order, T2-2021-14981, page 22)

As in the prior appeal hearing, an application for GHP is not before the County, so Exhibit R.6 is not relevant. Options are either to find the application is exempt from the GHP requirement based on evidence, or, impose a condition of approval based on the foregoing analysis (GHP appears feasible) by requiring the applicant to submit a GHP application for review and approval prior to submission of building permits for a farm dwelling. In this scenario, staff believes that you would need to find that subsequent approval of the GHP is feasible and would be nondiscretionary based on evidence already in the record.

#### Erosion and Sediment Control Permit (ESC)

The standards for an Erosion and Sediment Control Permit (ESC) would apply if no GHP is required; a proposal to develop a property would require either an ESC or a GH permit but not both, because the GHP includes requirements for erosion and sediment control.<sup>2</sup>

In your Final Order you note that the ESC is for health and safety purposes, 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 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).” (Hearings Officer Final Order, T2-2021-14981, page 23)

If you approve the farm dwelling application and find it is exempt from GHP, a condition of approval requiring the applicant to submit an ESC application for review and approval prior to submission of building permits would be appropriate.

#### **Conclusion**

The Hearings Officer can weigh the Appellant’s new evidence of farm income and determine whether the criteria for approval of a Customary Farm Dwelling Permit are met or can be met by imposing

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<sup>2</sup> § 39.6210 PERMITS REQUIRED. (A) Unless exempt under this Code, whether under MCC 39.6215, 39.5080, 38.5510 or otherwise, no ground disturbing activity shall occur except **pursuant to one of the following permits**: a Minimal Impact Project (MIP) permit, an Erosion and Sediment Control permit (ESC), an Agricultural Fill permit (AF), a Geologic Hazards permit (GH), or a Large Fill permit (LF).

conditions of approval. Staff concurs with the Appellant that the requirements Geologic Hazard Permit can be met if the dwelling is not otherwise exempt (for maintenance of an existing drive), subject to conditions of approval, and any building permit would be subject to review and approval of the Transportation Division for compliance with County transportation safety standards. (The requirements for an ESC Permit would apply only if no GHP is required, and compliance with ESC requirements can be assured through conditions of approval.) Staff requests the Hearings Office clarify whether the requested SEC-h permit is approved, as staff previously recommended.