

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

In the matter of an application by)
Tim and Angela Schillereff, dba)
Sauvie Island Kennels, for)
verification of a nonconforming)
kennel use and expansion of that)
kennel from four dogs to 75 dogs.)
)
County File Nos. CU 4-95 & MC 1-)
95 On remand from LUBA –)
LUBA No. 98-044, CA 105172)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW and
FINAL ORDER**

The Hearings Officer hereby approves the applicants' two-part request for verification of their nonconforming kennel operation and expansion of the capacity of that kennel from four dogs to 75 dogs. In particular, the Hearings Officer approves the verification and both of the applicants' alternative expansion requests, *i.e.*, expansion of nonconforming uses under MCC 11.15.8810 and 11.15.2012(B)(11).

The Hearings Officer finds and concludes as follows:

I. Factual Overview:

The applicants, Tim and Angela Schillereff, own and operate Sauvie Island Kennels on Sauvie Island on a 9.41-acre parcel zoned and planned for exclusive farm use (EFU). The Schillereffs acquired the property and kennel in 1989 and have operated it as a dog kennel throughout the time they have owned it. The history of use of the property as a kennel is one of the primary factual issues in this proceeding, and the record contains an abundance of evidence on this issue and is discussed below in the Findings and Discussion section under Base Nonconforming Use.

The following farm properties surround the subject site, all of which are actively operated as farms:

- Marquam Farms Corporation (east and northeast)
- Vetsch Dairy Farm (south and southeast)
- Ray Nursery (southwest)
- Sauvie Island Wildlife Preserve (north and west)

The specific activities conducted on these properties is described in an accurate and detailed manner in the applicants' May 19, 2000 "Agricultural Analysis". *See* May 19,

2000 Case Binder.¹ The property immediately east of the subject property is owned by Marquam Farms Corporation and operated as a private duck hunting club.

This application was first filed in 1995 and was approved by the Hearings Officer and Board of Commissioners at that time. Marquam Farms Corporation appealed the County's decision to LUBA, which reversed and remanded, and the applicants and County appealed to the Court of Appeals, which affirmed in a separate written opinion.² On remand, the Board of Commissioners again approved the application and adopted new findings in February 1998. Marquam Farms Corporation again appealed the decision to LUBA which again reversed and remanded. The Court of Appeals affirmed LUBA, but this time without a written opinion.³

On remand for the second time to the County, the Board of Commissioners, on January 25, 2000, referred the matter back to the Hearings Officer to take further evidence. A duly noticed public hearing was held April 7, 2000 before the Hearings Officer. Oral and written testimony was taken from a large number of people on a wide range of topics related to the applications. Following the April 7th hearing, the record was held open for submission of written materials by both parties to the proceeding, *i.e.*, the applicants and Marquam Farms Corporation. Both parties were then afforded the opportunity to rebut and respond to new evidence submitted by the other side, and final legal argument was then allowed.

During the pendency of this latest remand proceeding, the applicants have provided substantial and detailed information about the altered kennel operation and improvements to the kennel facility – already constructed and planned – and measures that will be taken to mitigate or eliminate off-site impacts. Much of this information focused on alleged impacts to hunting activities on the Marquam Farms Corporation property.

Prior to the close of the record, Marquam Farms Corporation advised the Hearings Officer in writing that, based on the applicants' detailed plans and mitigation measures, it no longer anticipates any impacts from the kennel operation and therefore no longer opposes the application. The effect of this position now taken by Marquam Farms

¹ The applicants have submitted two "case binders" in notebooks prepared by Winterowd Planning Services. The first "Case Binder" was prepared for the January 25, 2000 public hearing before the Multnomah County Board of Commissioners, and is dated January 25, 2000. The second "Case Binder," entitled "First Rebuttal on Evidence Presented at 4/7/00 Hearing" was prepared following the April 7, 2000 public hearing before the Hearings Officer, and is dated May 19, 2000. The "Agricultural Analysis" is Part III of the second (May 19, 2000) "Case Binder."

² *Marquam Farms v. Multnomah County*, 32 Or LUBA 755 (1996), *aff'd* 147 OrApp 368, 936 P2d 990 (1997).

³ *Marquam Farms v. Multnomah County*, ___ Or LUBA ___ (LUBA No. 98-044, 1998), *aff'd w/out op.* 159 OrApp 681, 981 P2d 399 (1999).

Corporation is discussed in detail below in the Findings and Discussion section in the context of impacts of the proposal on the neighborhood.

II. The Application, Procedure and Procedural History:

This matter originally came before the County in 1995 in the form of the following three alternative applications to allow the applicants' proposed kennel expansion to 75 dogs:

- A. MCC 11.15.8810 – to allow expansion of a lawful existing kennel (nonconforming use) on EFU land to a capacity of 75 dogs;
- B. MCC 11.15.2028(B) – a conditional use permit (CUP) that would allow the expansion to 75 dogs of a lawful existing dog kennel on EFU land; and
- C. MCC 11.15.7120 – a CUP for a new 75-dog kennel on EFU land.

In 1995, the applicants took the approach of three alternative applications to achieve the same outcome due to the ambiguities in the Multnomah County Code (MCC) as to the status of the applicants' existing kennel operation. In its present posture, the applicants are proceeding with two alternative applications from the original three. Still before the Hearings Officer is the application for expansion of a lawful nonconforming use under MCC 11.15.8810. Still before the Hearings Officer is a CUP request for the expanded use; however, the legal theory behind the CUP application has changed somewhat in light of LUBA's and the Court of Appeals' remand orders.

Expansion of the dog kennel as a CUP requires that the kennel have a legal starting point – either as a nonconforming use or under some other theory. At the time of the 1995 application, the Hearings Officer and Board of Commissioners interpreted MCC 11.15.2028 to convert automatically, by operation of law, a nonconforming use into a legal conforming use. This provided the “legal starting point” which could then be expanded as a CUP under MCC 11.15.2028. Under the County's interpretation, however, the state law requirements governing use of EFU land were not addressed satisfactorily, *i.e.*, ORS 215.296. Therefore, LUBA and the Court of Appeals specifically rejected this interpretation of MCC 11.15.2028 – at least to the extent that the local code provisions could authorize the automatic conversion of a nonconforming use on EFU land into a legal “conforming” one.

In its present posture, the applicants are still proceeding with an application for a CUP to expand a lawful, existing dog kennel use. However, the legal starting point is not, as previously held, the automatic conversion of the nonconforming use into a legal conforming one, but rather the lawful nonconforming use itself. As explained in greater detail under the discussion of legal standards, expansion of an existing dog kennel on EFU land pursuant to MCC 11.15.2028 and state law requires only a legal starting point,

and the legal starting point now relied upon is the applicants' claimed nonconforming 4-dog kennel use. Therefore, the threshold issue not addressed previously – but which is now a primary focus – is the verification of the applicants' base nonconforming kennel use, *i.e.*, the applicants must prove the legal starting point of a nonconforming use.

III. Controlling Legal Standards:

This application involves three legal issues controlled by three sets of legal standards:

- A. Underlying nonconforming use – the legal starting point: Have the applicants established their claimed nonconforming use right to a kennel? More specifically, have the applicants proven that there were four or more dogs on the property at the time restrictive zoning was first imposed in 1958, and has a four or more dog kennel been in existence since that time, with no lapses of 12 months or more?
- B. Expansion through NCU expansion criteria: Have the applicants demonstrated compliance with the criteria of MCC 11.15.8810 and ORS 215.130 for the expansion of a lawful existing nonconforming use?
- C. Expansion through CUP criteria: Have the applicants demonstrated compliance with the criteria of MCC 11.15.7120 and ORS 215.296?

The applicants lose if they do not carry their burden under the first legal standard, *i.e.*, if they fail to prove their underlying nonconforming use of a 4-dog kennel. Assuming *arguendo* that they meet that burden, the applicants maintain that their expansion can be permitted if they meet either the second or third legal burden, but need not meet both. The only other participant in this proceeding, Marquam Farms Corporation, now supports the application and this interpretation of the County's standards, and as explained below, so does the Hearings Officer.

A. Base Nonconforming Use.

LUBA remanded this matter in 1996 for, among other things, a determination of the nature and extent of the underlying nonconforming use claim, before an expansion could be entertained.⁴ In particular, LUBA noted that the County had not demonstrated the nature and extent of the applicant's claimed nonconforming kennel operation. During the first remand proceeding, the County Board of Commissioners relied upon evidence of the facility's capacity that had consistently been maintained over the years (from 1958 to the present) as the measure of the nature and extent of the nonconforming kennel use. On

⁴ *Marquam Farms v. Multnomah County*, 32 Or LUBA 755 (1996), *aff'd* 147 OrApp 368, 936 P2d 990 (1997).

appeal, LUBA rejected that approach and required that the nature and extent of this nonconforming use be measured by counting the number of dogs.⁵

MCC 11.15.0005 defines “kennel” as “[a]ny lot or premises on which four or more dogs, more than six months of age, are kept.” The code does not distinguish between commercial and noncommercial kennels, and the request before the Hearings Officer simply seeks verification of a nonconforming kennel. Restrictive zoning on the subject site was first imposed in 1958. The basic standard that must be proven is that at least four dogs were on the subject site beginning in 1958 when restrictive zoning was first imposed and that this 4-dog kennel was continued each year through to 1995 (the year of the Schillereffs’ application). The applicants will meet this burden if they demonstrate, with substantial evidence in the record, that at least four dogs were on the property at least once each year from 1958 to 1995, and that this 4-dog level of activity did not lapse for more than 12 consecutive months.⁶

There is substantial evidence in the record – in terms of signed affidavits, letters and live testimony from the 1995 and 2000 hearings – describing the level of dog activities on the property from 1958 to the present. The applicants have provided a year-by-year chronology of kennel activity and the number of dogs on the subject property, including a detailed narrative, supporting affidavits and testimony – both new and evidence already in the record. The applicants also submitted a bar graph and matrix depicting kennel activity from 1958 to 1995 that lists the people involved over the years with citations to the record.⁷

B. Expansion of the nonconforming use under MCC 11.15.8810.

Both state law and the MCC provide standards and a procedure for alteration of a nonconforming use. The standard in MCC 11.15.8810 for allowing alteration of a nonconforming use, including expansions, is that “the alteration will affect the surrounding area to a lesser negative extent than the current use.” The parallel statute, ORS 215.130(9), limits approvable alterations to those that have “no greater adverse impact to the neighborhood” when compared to the base level of use. The applicants and Marquam Farms Corporation have stipulated that the two standards are, in legal and practical effect, the same. The Hearings Officer, however, finds that MCC 11.15.8810 imposes a more exacting standard than applied by ORS 215.130(9). Whether it is

⁵ *Marquam Farms v. Multnomah County*, ___ Or LUBA ___ (LUBA No. 98-044, 1998), *aff’d w/out op.* 159 OrApp 681, 981 P2d 399 (1999).

⁶ Since this application was filed, both State and County provisions have changed regarding verification of nonconforming uses. This decision relies on the State and code provisions in effect on the date the application was filed in 1995. ORS 215.427 (3) [as adopted in 1995, prior to codification as ORS 215.427(3)].

⁷ May 19, 2000 “Case Binder,” Part IV, Use and Impact Analysis, and Figure 2, Kennel Nature and Extent Matrix.

acceptable for the County to apply a more exacting standard to a nonconforming use in an EFU zoning district is not settled. This is, however, an issue that does not need to be addressed in this decision as the applicant has met the requirements of both standards and complies with County conditional use standards (*see* discussion, below).

ORS 215.130(10) authorizes local governments to adopt standards for evaluating the relative impacts of proposed alterations to nonconforming uses. MCC 11.15.8810(A)(2)(e) (1995 edition) implements this authority by providing a list of factors to evaluate and consider. These considerations are addressed in the next section. However, in response to applicants argument,⁸ the Hearings Officer concludes that no one of these criteria is dispositive, and that all must be balanced when evaluating the relative impacts of a proposed alteration when the entire alteration is viewed as a whole. In particular, while an alteration may have a greater impact with regard to one or more of the factors listed in MCC 11.15.8810(A)(2)(e), it may still meet the “no greater adverse impact” and “lesser negative extent” standards.

C. Expansion through the CUP criteria of MCC 11.15.7120.

MCC 11.15.2012(B) (1995 edition) listed dog kennels on EFU land as an allowed conditional use. New kennels, however, are prohibited uses on high value farmland per the terms of OAR 660-033-0130(18)(1995). This prohibition was in effect at the time the pending land use applications were filed with the County. OAR 660-033-0130(18)(1995) does, however, allow the expansion of “existing,” lawfully established and maintained, dog kennels on high value farmlands.

In 1997, MCC 11.15.2012(B) was amended to limit the scope of the kennel use previously allowed by the County to be consistent with the administrative rule. The County code now allows expansions and alterations of lawfully established dog kennels on high value EFU land as conditional uses, while prohibiting conditional use approval of new kennels on high value farmland. The County also requires new land use applications for approved conditional uses if and when the use is expanded or altered significantly from the conditional use approved by the County. In light of this background and the administrative rule, the Hearings Officer interprets the 1995 version of MCC 11.15.2012(B) to authorize the establishment, expansion and alteration of a kennel through the County’s conditional use process, provided the criteria of MCC 11.15.7120 are satisfied. The Hearings Officer finds, however, that the authorization to establish a kennel on high value farmland, such as the Schillereff property, was preempted by state law by the time the Schillereffs applied for conditional use approval. As a result, the conditional use permit may only authorize an alteration or expansion, but not the creation, of a kennel use on the Schillereff property.

State law does not specify what is meant by an “existing” dog kennel facility. Therefore, the Hearings Officer will infer that the administrative rule and parallel County

⁸ May 19, 2000 “Case Binder,” Part I, Legal Analysis, prepared by attorney Edward J. Sullivan.

code section allow the expansion on EFU land of any dog kennel that is lawfully established and existing. A lawfully established kennel could be either conforming or nonconforming – it does not matter so long as the kennel was lawfully established and currently has a lawful status. This legal interpretation is supported by the January 6, 2000 letter from Ron Eber, Farm and Forest Specialist for the Department of Land Conservation and Development. Therefore, so long as the applicants' kennel has a lawful starting point, it can be expanded as a conditional use subject to the conditional use review criteria in MCC 11.15.7120.

Both parties to this proceeding argue that expansion of a nonconforming dog kennel, as is the case here, requires compliance with either the NCU expansion criteria in MCC 11.15.8810 or compliance with the CUP criteria in MCC 11.15.7120, but not necessarily both. Under the particular facts of this case, the Hearings Officer agrees. Until 1995, the kennel use of the subject property was nonconforming only because it required a conditional use permit and no permit had been issued, not because the use could not be approved under the law then in effect. All that was needed to correct the nonconforming use status was a conditional use permit. In 1995, OAR 660-033-0130(18) prohibited new kennels from being established on the Schillereff property. This prohibition did not, however, apply to the Schillereff kennel because it was an existing, grandfathered four-dog kennel, a use that may be “maintained, enhanced or expanded, subject to other requirements of law” according to the plain language of OAR 660-033-0130(18). As OAR 660-033-0130(18) does not apply, it does not preclude the Schillereffs from asking for and receiving conditional use approval of the kennel under the provisions of MCC 11.15.7120 (1995).

IV. Findings and Discussion:

A. Base Nonconforming Use.

The applicants have provided substantial evidence regarding the lawful establishment of a kennel use on the site in 1958, the continued use of the property for kennel from 1958-1995, and the nature and extent of a kennel use on the site from 1958-1995. This information is summarized in Part IV of the May 19, 2000 “Case Binder,” and is visually represented in Figure 2 of the same binder. Part IV and Figure 2 reference Appendix 6 of the May 19, 2000 “Case Binder,” which includes 45 letters and affidavits documenting the nature and extent of the kennel use on the site from 1953-1989. Read together, these letters and affidavits identify the number of dogs kept on the property each year from 1953-1989, whether training and breeding of dogs also occurred, the number of employees (or volunteer help) associated with the kennel, and the characteristics and uses of kennel structures and grounds.

1. 1989 to Present. There is no dispute, and the record shows, that from 1989 through the present, the kennel has been used continually for at least 50 dogs, following the purchase of the property by the Schillereffs.

2. 1958-1969: The Alport/Rose, Blitz and Meifert Kennels. There is no dispute that commercial kennels housing 50-60 dogs were operated continuously on the site from 1953-1969 within two Quonset huts.⁹ During this period, the record supports the conclusion that dog training and breeding also occurred on the property with one or two employees in addition to the kennel owners. However, following the Meiferts' sale of the kennel to the Peins in 1969, the kennel was not operated commercially until the Schillereffs purchased the property in 1989. This 20-year period of non-commercial kennel use therefore deserves greater scrutiny.

Accordingly, the Hearings Officer will focus on the period after Mr. Meifert sold his property to the Peins in 1969, when the site ceased to be used as a commercial kennel operation. Again, it is important to note the definition of a "kennel" found in MCC 11.15.0010: "Any lot or premises on which four or more dogs, more than six months of age, are kept." MCC 11.15.7205 further defines "dog kennels" within the context of the conditional use process as follows: "Dog kennels, boarding, breeding, keeping or training places or the keeping or raising of four or more dogs over six months ..." Although the minimum threshold for a dog kennel is four adult dogs, dog kennels may also permissibly include the breeding and training of dogs. Of importance to this case, also, is the fact that the County definition does not require that a kennel be a commercial operation. Thus, the noncommercial kennel use of the property for twenty years does not prevent approval of a commercial kennel, if all conditional use or nonconforming use requirements for expansion of the kennel are satisfied.

3. 1969-1973: The Pein Kennels. The evidence in the record indicates that the Peins owned both the subject property (now owned by the Schillereffs) and the abutting property to the east (now owned by Marquam Farms) from 1969 to 1973.¹⁰ The Peins leased the frame house at the northeast corner of the property to their nephew, Henry Clark, and his family, who also were responsible for the daily operations of the kennel.¹¹ The Peins themselves owned three dogs during this period and kept them at the kennel.¹² They frequently spent weekends on-site¹³ visiting their nephew and his family,

⁹ Four separate commercial kennel operations were continuously present on the site during this period, owned by Alport/Rose, Blitz and Meifert, respectively. See May 19, 2000 "Case Binder," Part IV, pp. 2-4.

¹⁰ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 2, 11, 35, 40 and 42.

¹¹ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 40 and 42.

¹² May 19, 2000 "Case Binder," Part V, Appendix 6, Item 2.

¹³ Although the Peins did not reside on the property, Red Persinger states in his 1995 affidavit (Part V, Appendix 6, Item 2) that the Peins' three hunting dogs were kept on the kennel site. Myron Meifert (Part V, Appendix 6, Item 42) confirms that the Peins visited the property every Wednesday and weekends during the hunting season. They also held weekend events on the property during the summer. The Peins' nephew lived on the property and cared for the dogs.

and hunting with their dogs and the Persingers. The Persingers boarded from one to three of their dogs with the Peins at least once every year from 1969-1973, especially during hunting season.¹⁴ Thus, there were four or more dogs on the site every year during this period. Additional dogs were boarded on the site on a regular basis, especially during the summer months and the hunting season.¹⁵ Other testimony in the record demonstrates that there were 10 kennel runs left open in the smaller west Quonset hut, and that there were often 4-10 dogs housed within these runs.¹⁶ During summer and fall events, there were additional dogs in the kennels.

The kennel structures on the site consisted of the two original Quonset huts with open kennel runs facing northwest and southeast. The eastern Quonset hut was three times as long as the western Quonset hut. The large east structure was 15'x 60' and the smaller west structure was 15'x 20' (with 10 dog runs). The eastern kennel was used to a lesser extent during this period, and the western kennel (with 10 runs) was the primary kennel. In addition, there was a 75'x 30' dirt exercise pen off the West Kennel, which is where Red Persinger kept his own personal hunting dogs most of the time. There were a few other non-kennel related sheds on the property. During this period, trees continued to grow up around the Quonset huts, and began to obscure them (as shown by aerial photographs taken during this period).

Access to the site continued to be a gravel driveway from Reeder Road shared with the property to the east, owned at the time by the Peins, extending the full length of the common boundary of the two properties. Parking generally was along the shared drive, as there was no formal parking area, nor was there any formal landscaping associated with the kennels.

The record shows that the kennel use during this period included the training of dogs, especially hunting dogs.¹⁷ The Peins held special hunting-related events on the kennel property several times a year, especially during the summer.¹⁸ At those events, which lasted several days, people would bring their dogs and board them in the kennels. In addition, casual personal hunting occurred on the property during the hunting season.¹⁹ During this period hunting occurred on *all* of the Pein property, including that which is now owned by Marquam Farms. Although there were no employees *per se*, the Peins' nephew and his family operated the kennel and the Peins and Persingers often spent weekends on the property, assisting with kennel operations and training dogs. As shown

¹⁴ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 2 and 35.

¹⁵ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 2, 31 and 40.

¹⁶ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 2, 10-12, 31, 35, 40 and 42.

¹⁷ May 19, 2000 "Case Binder," Part V, Appendix 6, Item 35.

¹⁸ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 35 and 42.

¹⁹ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 9, 35 and 40.

by the above and letters and affidavits referenced from Appendix 6 of the May 19, 2000 “Case Binder,” the Peins continued use of the kennel on the site from late 1969 to 1973. The use of the site during this period is graphically represented in the May 19, 2000 “Case Binder,” Figure 2, Kennel Nature and Extent Matrix which is adopted as a part of the findings that support this decision.

There were two changes in the nature and extent of the kennel use under the Pein ownership as compared with the commercial kennel previously operated by Meifert. The first related to the number of dogs regularly housed on the property. This number decreased from 50-60 dogs each year to 4-10 dogs each year. There appear to have been more dogs several times a year during special events; although, the precise number of kennelled dogs is unclear from the record. The second related to employees. This number changed from 1-2 for the commercial kennel operations (depending on seasonal demand), to resident and volunteer help during the Pein era (Henry Clark and his family plus friends).

In summary, based on evidence in the record, the nature and extent of the kennel use from 1969-1973 included:

- the caretakers who lived in the existing frame house (Clarks) with regular non-paid assistance from the Peins and Persingers;
- two Quonset huts, one of which (the west hut) had exposed dog runs which housed from 4-10 dogs each year; and
- training of dogs, which occurred on the site each year.

This evidence was not disputed by any party to these proceedings and the Hearings Officer finds it to be credible.

4. 1973-1989: The Persinger Kennels. The evidence in the record indicates that the Persingers purchased the subject property (now owned by the Schillereffs) from the Peins in 1973. The record shows that the Persingers themselves owned 2 or 3 dogs at all times during this period.²⁰ The record shows that the same dogs were not present throughout this period, but when one died, it was replaced with another. Red Persinger usually kept his hunting dogs in the West Kennel, while his wife’s house-dog was kept at the house.

The Persingers boarded from 4-10 dogs on the site each year, on a regular basis, especially during the summer months, holidays, and the hunting season.²¹ The evidence shows that the dogs were boarded primarily in the West Kennel (west Quonset hut), although they may have also been kept occasionally in the east Quonset hut, along with

²⁰ May 19, 2000 “Case Binder,” Part V, Appendix 6, Items 2, 10, 40, 42. *See also* statement of Tim and Angela Schillereff (Part V, Appendix 6, Item 43, p. 2) regarding the reasons why avid hunters own more than one dog at a time.

²¹ May 19, 2000 “Case Binder”, Part V, Appendix 6, Items 2, 10, 20, 40 and 42.

stored materials and machinery.²² The Persingers lived in the frame house at the northeast corner of the property during this period. Aerial photographs provided by the applicant²³ show two original Quonset huts with open kennel runs facing northwest and southeast; although, the eastern Quonset hut fell into disuse during this period. By 1975, the kennel runs on either side of the east Quonset hut had been removed; although, the East Kennel structure was still occasionally used to house dogs. The West Kennel structure served as the primary kennel, and 10 outdoor kennel runs were kept in use.²⁴ As Myron Meifert stated in his May 8, 2000 letter:²⁵

“I have personally visited the kennels several times every year during the last twenty years since I sold the place. *** Red had also dismantled the outer runs of the large kennel building, but kept the inside wooden partitions. He had maintained the small kennel building and always had several dogs in it every time I came down to visit. All ten runs in this building were intact with the original fencing and gates that I had in 1969. The only thing different was that Red had constructed a roof over the outside runs. The birch and maple trees had definitely grown up over the last twenty years. Additionally, Red had planted several varieties of grapes and fruit trees near the kennel buildings.”

Much of the discussion at April 7, 2000 public hearing focused on the period from 1977-1989, after the Marquam Farms property (east of the kennel site) was purchased for use as a hunt club and farm. Donald Groth,²⁶ who hunted the Pein Lake property (now Marquam Farms) regularly from 1979-86, is persuasive in his documentation of the use of the Persinger Kennel:²⁷

“I first came to the property with my future son-in-law, Bill Warrington in 1979. Bill married my daughter Jean in 1982. Bill owned the adjacent 39 acres. The two properties shared the same driveway. It is at this time when I met Red and Marguerette Persinger, who lived in the little green house by the road. I went hunting with Red in the field right next to the

²² May 19, 2000 “Case Binder,” Part V, Appendix 1, p. 43, testimony of Tim Schillereff.

²³ January 25, 2000 “Case Binder,” Map 4, Aerial Photos.

²⁴ May 19, 2000 “Case Binder,” Part V, Appendix 6, Items 40 and 42; Appendix 5, Item 2, p. 3; and testimony of Thomas Pagh, certified photogrammetrist.

²⁵ May 19, 2000 “Case Binder,” Part V, Appendix 6, Item 42.

²⁶ Mr. Groth is the father-in-law of a previous owner of the “Pein Lake” property, Bill Warrington. Mr. Warrington shared an ownership interest in the 39-acre property with Dr. MacGregor. Mr. Maring acquired the property from Mr. Warrington in 1986, as a result of a foreclosure proceeding. Mr. Warrington is recently deceased.

²⁷ May 19, 2000 “Case Binder,” Part V, Appendix 6, Item 38.

kennel. My son-in-law had Pein Lake next to it. I knew that the Persingers had a kennel, and always had between 8 and 10 dogs in them. I knew Red's personal dogs, there were several different ones over the years. He always had a couple of good hunting dogs, usually Labrador retrievers. Every fall and winter from about 1980 to 1986, I hunted with my son-in-law and Red Persinger on the kennel property and the Pein Lake. There should be no question that a kennel existed on this place, I saw it filled with 8 to 10 dogs every time I came down to hunt. Red would always go to the back building to get one of his dogs out before we would start our hunt. I knew Marguerette had a little white house dog named "Charlie". I stopped hunting the Pein Lake when John Maring took over the Pein Lake property from my son-in-law in 1986. *** Bill knew the kennel was there and boarded his hunting dogs with the Persingers at least once or twice every year."

Further documentation of the existence of a dog kennel comes from a map²⁸ (date uncertain) that was prepared by Bill Warrington during the time he was a hunt club property owner with Dr. MacGregor (1977-1986), and was used to direct hunters to the Pein Lake hunting area. This map shows the "duck club" in relationship to Sturgeon Lake and the Columbia River at the bottom of the page, and then shows what is now the Marquam Farms property at a larger scale. The map clearly identifies "RED's Kennels" on the west, opposite the "clubhouse" south of the "Dike Lookout."

Active use of the West Kennel – with outdoor runs – is corroborated by Victor Shackleton, P.E. In 1988, Mr. Shackleton prepared the drawings of the then-existing kennels prior to the Schillereffs purchase of the property from the Persingers in 1989. According to Mr. Shackleton:²⁹

"I drew the site plans for Tim and Angela Schillereff for the permits they received in 1989 to remodel the existing kennel facility. In order to get the exact dimensions, I went to the property in the winter of 1988 and toured the kennels. To accurately reflect the size of the buildings and their location on the Persinger property, I measured them with my 100-foot measuring tape. I also measured the existing outside dog pens and the concrete foundation with cleaning troughs. *** As a fact, the Persingers had several dogs in the kennels at the time I measured the kennels. They were located in the small Quonset hut building. *** On March 3, 1989, I went with Tim Schillereff to Multnomah County with the remodeling proposal and they approved it and subsequently issued building permits because it was a grandfathered used."

²⁸ May 19, 2000 "Case Binder," Figure 4.

²⁹ May 19, 2000 "Case Binder," Part V, Appendix 6, Item 34.

To further substantiate the existence of occupied kennel runs at the West Kennel structure in 1989, the applicants' building contractor, Norman Russell, President of Russell Construction, stated:³⁰

"During the Spring of 1989, Russell Construction Inc. entered into a contract to remodel the Persinger Kennel. Tim Schillereff asked for our help to upgrade the kennel buildings, per building permits from Multnomah County. In 1989, the kennel buildings consisted of two Army surplus Quonset huts. The large east building was 15 feet wide by 60 feet long and the small west building was 15 feet wide by 20 feet long. The building had a total of 36 wooden inside dog enclosures, 10 in the small building and 26 in the large building. *** The west kennel building had 10 existing chain link outside runs, covered by an overhang, and off to the north side was a free standing chain link exercise pen approximately 75 feet long by 30 feet long. The buildings were shaded by full growth birch, maple, and elm trees, and grapes were growing along the fencing of the exercise pen. In fact, we had to trim some of the trees back to accomplish our work. The small building had many dogs in it and they temporarily relocated the dogs into the large building while we worked on the small building. We did not replace the chainlink fencing in the small building because it was still in very good condition and the Schillereff's were on a tight budget. We did replace the fencing in the large kennel building. We also added two rows of concrete block, under the new fencing to further separate each pen. ***

"The kennel runs (foundations) and cleaning troughs were the original concrete slab that was poured in 1953, as evidenced by the date inscribed in the concrete. The septic tank was a round metal 1000 gallon tank that still in use in 1989. Both buildings had gravity flow from the runs to the cleaning troughs to the septic tank. It was well designed and still in use. We completed our work in May of 1989."

This evidence establishes the existence of 10 outdoor kennel runs with "many dogs" in both 1989 and 1990. This evidence corroborates other testimony in the record from people who knew the Persingers in the 1970s and 1980s, who boarded their dogs at the Persingers' kennel or who hunted with the Persingers during this period.

The Hearings Officer finds the testimony of Ryan Burns,³¹ who lives just down the road from the site, to be convincing:

³⁰ May 19, 2000 "Case Binder," Part V, Appendix 6, Item 36.

³¹ May 19, 2000 "Case Binder," Part V, Appendix 6, Item 40.

“My home is ½ mile northwest of the kennel and I am one of the closest residential neighbors. I have lived on Sauvie Island all my life. *** There has always been a kennel with dogs on the property since the early 1950s.

“In the winter of 1988 and spring of 1989, I assisted the Schillereffs with the remodeling to the Persinger kennel on the property. The Persinger kennel buildings were two old gray army surplus Quonset huts, one large and one small. There was still in the Schillereff Kennel the original concrete foundation, and ten fenced enclosures off of the smaller building. The outside runs had a tin roof over them that Red Persinger constructed, and unless you looked for them, they could not be easily seen from the driveway. The large old building only had inside runs, no outside runs. Red Persinger, who owned the place, also stored his tools in the large building. I remember well what it looked like because I went inside with Red on numerous occasions when I needed to borrow some of his tools.

“As for the number of dogs on the property, I knew the Persingers had several dogs. The last one I remember was ‘Bud’, an old chocolate Labrador retriever male, who just died last year at the age of 16 years. The Persingers moved to the Island in 1973 with ‘Toby’, a Labrador retriever male, ‘Duke’, a Labrador-Pointer cross male, and ‘Charlie’, a small white terrier. Later, they had ‘Jake’ a golden retriever male and ‘Sunny’, another Labrador retriever male when ‘Toby’ and ‘Duke’ passed on. They always had several dogs on their place and in the kennels.”

In conclusion, there is substantial evidence documenting the continued, active existence of a kennel and dog-training operation, serving 4-10 dogs, at least once each year from 1973-1989 and usually more often. However, as indicated below, the record also includes some contradictory information that must be addressed. This evidence is summarized in the May 19, 2000 “Case Binder,” Part IV “Use and Impact Analysis” and Figure 2, “Nature and Extent Matrix,” which documents are adopted as a part of the findings that support this decision. Appendix 6 of the same “Case Binder” includes 45 letters and affidavits documenting the nature and extent of the kennel use during this period.

5. Contradictory Marquam Farms Testimony. The record includes contradictory testimony from members of the Marquam Farms hunt club regarding the nature and extent of the kennel use. The Hearings Officer notes that this testimony was provided prior to submission of more detailed evidence by the applicants, at or following the April 7, 2000 public hearing. The record includes testimony from members of the hunt club to the effect that:

- Red Persinger only owned one dog from 1985-1989 (Bonar, Koch, Maring, McAlister, Wingert);

- Some hunt club members never saw dogs boarded on the property from 1983-1990 other than Red's hunting dog (Hill, Isensee, Koch, MacGregor, Maring, McAllister, Ray);
- There was no kennel and or outdoor fenced runs on the property from 1983-1989 (Koch, MacGregor, Maring, McAllister, Ray); and
- The Persinger property was not used as a kennel for periods of time ranging from 1977-1990 (Hickman, Hill, MacGregor, Ray).

At the April 7th public hearing, Marquam Farms also provided two expert witnesses – Dr. Groves, a veterinarian and Mr. Pagh, a expert in the interpretation of aerial photographs – who called into question some of the testimony provided by the applicants in their January 25, 2000 “Case Binder.” Dr. Groves stated that hunting dogs typically live from 10-14 years, thereby calling into question the likelihood that Persingers’ hunting dogs could have survived from the early 1970s through the late 1980s. Mr. Pagh concluded that outdoor kennel runs associated with the east Quonset hut had been removed, and that the presence of outdoor kennel runs associated with the west Quonset was inconclusive, thereby calling into question the use of these structures for kennel purposes into the late 1980s.

These apparent contradictions were convincingly addressed by Winterowd Planning Services in some detail in the May 19, 2000 “Case Binder,” Part IV, “Use and Impact Analysis,” pp. 4-14. In addition, the Hearings Officer notes that Marquam Farms no longer contests that conclusion that the West Kennel was used as a kennel during the Persinger period (1973-1989).

Although several hunt club members testified that they saw no dogs from 1983-1989, others testified that they saw as many as two dogs during this period (a red hunting dog and a white house dog), and one member testified that he saw dogs owned by friends of the Persingers on the property. Aside from these internal contradictions, the record is clear that the Persingers owned at least two adult dogs for much of this period – a hunting dog (Bud) and a house dog (Charlie).³² Because “Bud” was kept in the West Kennel and “Charlie” was kept in the house, hunt club members would not necessarily have been aware of their presence. Marquam Farms also provided expert evidence (Dr. Robert Groves, a veterinarian) to the effect that dogs live an average of 10-14 years, and that dogs owned by the Persingers in the early 1970s likely would not have lived through the late 1980s. However, the Burns letter makes it clear that the Persingers owned at least two generations of dogs from 1970-89, which is consistent with Dr. Groves’ testimony. The fact that hunt club members did not observe dogs on the site, in this situation, is not conclusive as to whether there were actually dogs on the site during this period. Therefore, the Hearings Officer gives greater weight to the more specific and detailed testimony documenting the names and characteristics of at least two dogs owned by the Persingers from 1983-1989.

³² May 19, 2000 “Case Binder,” Part V, Appendix 6, Item 40.

Several hunt club members testified that the Quonset hut (singular) was not used for a kennel after 1977. Yet it is clear from the record that there were, in fact, two Quonset huts on the site, from 1953-1996, when the Schillereffs remodeled in 1989. All parties agree that outdoor runs associated with the east Quonset hut were removed in the late 1970s.³³ This testimony is supported by expert photographic analysis provided by Mr. Pagh. Mr. Pagh determined that there were no outdoor kennel runs “east or west” of the large east Quonset hut from 1975-1984. However, hunt club testimony regarding the west Quonset hut analyzed by Mr. Pagh is not convincing, because none of the hunt club members addressed specifically the west Quonset hut. This is important, because testimony submitted by the applicant at and following the April 7th hearing clearly states that the west Quonset hut (West Kennel) was the structure used to house Mr. Persinger’s and his friends dogs after 1977.

The Hearings Officer notes that Mr. Pagh’s analysis of the west Quonset hut is equivocal. He observed that the outdoor runs were at various points: “obscured by shadows,” “obscured by vegetation,” “either roofline has changed or storage of some sort,” “no runs, vegetation up to side of building.” Yet, numerous letters and affidavits in Appendix 6 explain how the existence of 10 outdoor kennel runs could be interpreted in a manner not inconsistent with Mr. Pagh’s findings. An absence of affirmative evidence, in the form of clear aerial photographs, is not evidence that the west Quonset hut was gone.

Several neighbors stated that vegetation was up to the sides of the kennel, that Mr. Persinger had planted several varieties of grapes and fruit trees around the West Kennel, and that Mr. Persinger had altered the roofline by adding a tin roof that covered the outdoor kennel runs.³⁴ Testimony of the professional engineer and contractor who worked on the kennel remodeling (quoted above) confirms that vegetation and the new metal roof obscured the outdoor kennels runs off of the small west Quonset hut, making aerial photographic analysis inconclusive.

As indicated above, Marquam Farms now recognizes the existence of the West Kennel, based on new evidence provided at and after the April 7, 2000 public hearing (Appendix 6). Marquam Farms also agrees that this evidence can also be reconciled with the apparently contradictory testimony of Mr. Pagh, a photographic expert, and some Marquam Farm members.

The Hearings Officer notes, and Marquam Farms now agrees, that evidence from Marquam Farms witnesses can be reconciled with evidence presented by the applicants

³³ May 19, 2000 “Case Binder,” Part V, Appendix 6, Item 42, Myron Meifert: “Red had also dismantled the outer runs of the large kennel building, but kept the inside wooden partitions.” *See also* Item 40, Ryan Burns: “[In the 1989 remodeling] The large, old building only had inside runs, no outside runs. Red Persinger, who owned the place, also stored his tools in the large building.”

³⁴ May 19, 2000 “Case Binder,” Part V, Appendix 6, Items 36, 40 and 42, and Appendix 5, Item 2, p. 3.

following the April 7, 2000 public hearing. Because none of the hunt club members were aware of the continued existence of runs in and outside of the West Kennel, let alone how it was used, the Hearings Officer finds that the original hunt club testimony is not persuasive regarding the existence and use of a kennel on the property. In contrast, the Hearings Officer finds that testimony from numerous neighbors, the building contractor, the building engineer, the Persingers and the applicants themselves is persuasive regarding the nature and extent of how the West Kennel was used under the Persingers' tenure. The Hearings Officer believes testimony in the record stating that the West Kennel was (a) used as the primary Persinger kennel from 1977-89; and (b) obscured from view from the hunt club by the east Quonset hut and dense vegetation. The Hearings Officer also concludes that the West Kennel could have been, and in fact was, used to house 4-10 dogs on at least an annual basis without the awareness of Hunt Club members.

The record also shows that the Persinger kennel use included the training and breeding of dogs.³⁵ Red Persinger preferred male dogs, but used them as studs for breeding. Tim Schillereff also remembers picking out puppies from litters as a child at Red's kennel on this site. There is no evidence in the record as to whether the Persingers employed additional staff to maintain the kennel, or to train and breed dogs. However, the Persingers were often accompanied on the property by family and friends who would come to hunt and assist with the kennel operations.³⁶

From 1973-89, the Persingers continued the uninterrupted operation of the kennel, similar to the Peins and primarily in the smaller west Quonset hut. There was one change in the nature and extent of the kennel use from the Pein era – most kennel activity occurred either outdoors in the large dirt pen off of the West Kennel, or in the west Quonset hut.³⁷ Casual personal hunting continued on the property during the hunting season.³⁸ Special summer events such as turkey shoots and trapshoots were also held, and hunting dogs typically accompanied their owners to these events.³⁹ The purpose of these events was directly related to the training of dogs for hunting purposes.

³⁵ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 3, 14, 35 and 39.

³⁶ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 11, 14 and 42.

³⁷ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 34-36, 40 and 42; *see also* Part V, Appendix 5, Item 2, p. 3.

³⁸ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 14 and 38; *see also* Myron Meifert's testimony, Appendix 1, p. 55.

³⁹ May 19, 2000 "Case Binder," Part V, Appendix 6, Item 14, Tim Schillereff: "I also remember the summer trapshoots in which 75-100 people would attend, all their family and friends. These occurred during the years that the Persingers owned the property. I recall the bird dogs barking at the shooting and Uncle Red would quiet them down." *See also* Part V, Appendix 6, Item 35, Ralph Mowatt: "I attended for several years the annual turkey shoots that the Persingers held around the fourth of July. I would always see and hear many dogs in the kennels at these occasions ***."

In conclusion, the Hearings Officer finds that the nature and extent of the kennel use from 1973-89⁴⁰ included:

- The owners/caretakers who lived in the existing frame house (Persingers);
- Two Quonset huts, one of which (the west hut) had exposed dog runs which regularly housed from 4-10 dogs, including one or more dogs owned by the Persingers;
- The training and intermittent breeding of dogs on-site; and
- No additional kennel-related employees, though family and friends of the Persingers regularly assisted with kennel operations.

B. Expansion of the nonconforming use under MCC 11.15.8810:

The Hearings Officer must now consider the cumulative difference in impacts on the neighborhood between (a) the lowest documented level of use during the Persinger era, and (b) the level of use proposed by the applicants as required by MCC 11.15.8810. In this case, the proposed level of use has actually been constructed – a 75-dog kennel, and therefore actual impacts are relatively known and well-documented.

1. Persinger Era – Base Case (1973-89). The nature and extent of the Persinger kennel operation is as follows:

- The existing frame house (occupied by the Persingers);
- The east Quonset hut, which was used primarily as a storage shed and occasionally as a dog kennel, with no outdoor runs and single-wall construction;
- The west Quonset hut, which was used primarily as a dog kennel, with 10 outdoor runs facing north and south, buffered by dense vegetation, which regularly housed from 4 to 10 dogs;
- A 75'x 30' outdoor dirt exercise pen off the West Kennel;
- Two separate septic systems, one for the kennel and one for the residence;
- A gravel driveway and parking area without perimeter landscaping; and
- Poor sight distance caused by overgrown vegetation at the intersection of the shared (with Marquam Farms) driveway and Reeder Road.

2. Existing Schillereff Kennel (with implemented nonconforming use expansion approved by DR 1-96). The existing nature and extent of the kennel operation is as follows:

- The existing frame house (occupied by an elderly family member);
- Night watchman's dwelling with landscaping, approved by the County as an accessory use to the primary kennel use in 1990;
- A new, 75-dog capacity kennel with double wall construction, landscaping and enclosed kennel runs along the west and east walls;

⁴⁰ This is the nature and extent of the use on August 14, 1980, consistent with MCC 11.15.2028.

- A solid wood fence along the north kennel run;
 - An agricultural storage structure the full length adjacent to the south wall of the remodeled kennel;
 - A visual buffer of birch trees planted in the early 1990s along the north kennel wall;
 - Three septic systems, two previously existing and one new septic system installed for the new building to accommodate increased demand consistent with DEQ standards;
 - A paved and landscaped parking area for customers with landscaping in compliance with County standards;
 - A gravel driveway with adequate sight distance due to recent removal of overgrown vegetation along Reeder Road; and
 - A fence constructed by Marquam Farms between the kennel and hunt club.
3. Nonconforming Use Review Criteria. The May 19, 2000 “Case Binder,” Part IV, identifies impacts on surrounding properties within the 1,500 foot impact area (*i.e.* the neighborhood) for both the Persinger kennel (base case) and Schillereff kennel (implemented expansion with mitigation). The hearings officer adopts the Part IV identification of impacts text as findings that support approval of this application.

MCC 11.15.8810.E. states that “An alteration of a nonconforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent than the current use,” after considering 10 factors. The Hearings Officer must determine that the negative impacts on the neighborhood resulting from the remodeled Schillereff Kennel will, on balance, be less than the negative impacts on the neighborhood that resulted from the Persinger kennel.

1. *The character of the area and history of the use and of development in the surrounding area.*

The “surrounding area” is defined as a 1,500-foot impact area described in detail in the May 25, 2000 “Case Binder,” Part III, Agricultural Analysis.⁴¹ Land uses in the surrounding area include agriculture (all directions), rural residential uses (southwest and west within the impact area), and public wildlife management (north and west). Agricultural uses include a dairy operation, grazing, farm dwellings, forage crops for cattle, grass seed, row crops, berries, and farm use related traffic. Hunting for water fowl occurs on all agricultural properties within the impact area. The Wildlife Refuge to the north and west allows grazing of cattle and hunting of wildfowl, which are consistent with wildlife management. Wildlife management uses include forage crops for

⁴¹ In 1995, the prior Hearings Officer concluded that the applicant’s chosen impact area radius of 1,500 feet “adequately determines the extent of the ‘surrounding lands’ that MCC 11.15.7122(A)(1) requires the Applicant to address.” Hearings Officer Decision, CU 4-95 & MC 1-95, September 15, 1995, page 68. The adequacy of the radius of the impact area has never been raised in any subsequent proceeding and is not an issue on remand.

waterfowl, grazing, maintenance of ponds and land for hunting use, hunting, dog training and trials, and recreational uses.

As evidenced in the May 25, 2000 “Case Binder,” Part V, Appendix 6, agriculture, hunting, dog breeding and training, and rural residential development are viewed as complementary uses by residents of Sauvie Island. This theme appears over and over again in testimony by existing and previous island residents in 45 letters and affidavits contained in Appendix 6. This theme was also reflected in oral testimony received at the April 7th hearing.

Evidence in the record shows that kennel operations and the training and breeding of hunting dogs have historically been viewed as complementary to hunting operations.⁴² There is also extensive evidence in the record that barking dogs do not have an adverse impact on hunting for waterfowl. There is considerable testimony in the record from Marquam Farms regarding alleged incompatibilities between the expanded kennel and hunting operations, primarily based on the proximity of members of the public to shooting and the sound of barking dogs. The Hearings Officer is advised that Marquam Farms has reached a written agreement with the Schillereffs that includes mitigation bonds, some of which are incorporated in this decision as conditions of approval at the request of the parties. Based on the Agreement and the conditions of approval, Marquam Farms now agrees with other island residents and business owners that the expanded kennel – with specific mitigation measures – will not adversely impact hunting operations. Thus, Marquam Farms now believes that all previously identified incompatibilities have been resolved based on mitigation measures already in place, conditions of approval to be imposed in this decision, and conditions in the Agreement between the parties.

There is one issue related to the character of the area and the historical relationship between the Marquam Farms hunt club and Sauvie Island Kennel – at least since the Schillereffs purchased the property from the Persingers in 1989. Mr. Maring, President of Marquam Farms Corporation, testified at some length that more intensive use of the kennel property limited the hunt club’s ability to hunt on the 39-acre Pein property, abutting the kennel to the east.⁴³ Although there is countervailing testimony in the record regarding this issue,⁴⁴ the Hearings Officer believes that conditions of approval requested by the parties are appropriate to mitigate this potential impact. The following conditions are agreeable to both parties in this case (Marquam Farms and the Schillereffs), and will be sufficient to mitigate any impacts on Marquam Farms:

⁴² May 19, 2000 “Case Binder,” Part V, Appendix 6, Items 3, 5-8, 14, 19, 22-25, 27-30, 33, 35, 40, 41, 43 and 45.

⁴³ May 19, 2000 “Case Binder,” Part V, Appendix 1, pp. 87 and 92-93.

⁴⁴ May 19, 2000 “Case Binder,” Part V, Appendix 6, Items 32 and 35.

- 1. Future expansion of kennel uses and structures on the site shall not be permitted any further to the east than improvements presently existing on the site.**
- 2. The applicants shall sign an agreement stating that existing and future property owners will not to object to hunting activities on the abutting property to the east, provided that shooting does not occur closer than 100 yards from the nearest point of the paved parking area, as currently existing on the site.**
- 3. Conditions 1 and 2 shall be recorded as a restrictive covenant and shall run with the land.**

These conditions will ensure that the expanded kennel operation will not limit hunting operations in the western portion of on the Marquam Farms property, any more than such operations were limited during the Persinger era.

During the hearing evidence was introduced that the County has given Marquam Farms notice that its structures and hunting uses on its property have not received permits. Because the most significant evidence of potential adverse impacts is on those hunting uses, this could raise a question in this proceeding whether the uses are lawful, including whether they are lawfully pre-existing nonconforming uses. If the uses are not lawful, then any adverse impacts of the kennel use on them may not be relevant to these proceedings. The parties have, however, reached an agreement that they conclude fully mitigates any potential adverse impacts on Marquam Farms' hunting uses and the Hearings Officer finds that it, therefore, is not necessary to resolve the issue of lawfulness of those uses.

2. *The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line.*

Noise Impacts: The Hearings Officer relies on the noise study prepared by Al Duble, P.E., in reaching the conclusion that noise impacts, in all directions, are less from the 75-dog kennel as currently constructed than from the 4-10 dog kennel that existed during the Persinger era. This is because the new kennel, as approved through the County's 1996 design review process, was designed to reduce noise impacts in all directions, except to the north. To reduce noise impacts to the north (*i.e.*, towards the wildlife refuge), the applicant has voluntarily constructed a solid wood fence along the full length of the northern row of previously exposed dog runs. According to the Duble Noise study,⁴⁵ this improvement results in lower noise levels than would have occurred at the Persinger kennel, because the Persinger kennel had no noise mitigation structure and barking dogs were completely exposed to the outside. Moreover, the Hearings Officer finds that the

⁴⁵ May 19, 2000 "Case Binder," Part V, Appendix 4, p. 5.

new permanent kennel structure reduces the ability of kenneled dogs to see traffic along the shared driveway, which will reduce the likelihood of dogs barking in the first place.⁴⁶

The applicants have produced substantial evidence that kennel-related noise has no impact on accepted farm practices in the surrounding area.⁴⁷ As indicated above, the Hearings Officer is persuaded that kenneled dogs, whether or not they are barking, do not scare waterfowl⁴⁸ or detract from waterfowl hunting on adjacent property.⁴⁹ As indicated above, even if kenneled dogs did frighten waterfowl, the modern building improvements effectively make the noise of 75 enclosed dogs less audible than the noise of 4-10 dogs in the previous open pens.⁵⁰ Although Marquam Farms presented contradictory evidence, the Hearings Officer is advised by the parties that based on (a) the mitigation measures already in place, and (b) conditions in the Agreement between the parties, Marquam Farms is satisfied that any adverse impacts from barking dogs are fully mitigated.

The Schillereffs intermittently train sporting dogs at the kennel. The training activities provide a direct benefit to island hunters, including members of the hunt club.⁵¹ Dogs are rarely trained on the property during hunting season or outside of business hours. Therefore, the Hearings Officer concludes there is, on balance, no adverse impact on neighboring properties from training operations.

There is testimony in the record that the noise of barking dogs adversely affects bird watching activity at Coon Point in the State wildlife refuge. Since this issue was not addressed prior to this remand proceeding, this potential impact is not at issue. In any case, the Hearings Officer finds that the applicants have provided expert testimony from Al Duble that states that construction of a cedar fence at north kennel runs reduces the L50 dBA sound level to a level below that of 4-10 dogs in an uncontrolled area.⁵² Therefore, the Hearings Officer determines that no further mitigation would be required even if birdwatchers had standing in this appeal. Moreover, there is no evidence or

⁴⁶ May 19, 2000 “Case Binder,” Part V, Appendix 4, Noise Rebuttal, p. 9.

⁴⁷ May 19, 2000 “Case Binder,” Part V, Appendix 5, p. 1 and Part III, Agricultural Analysis, p. 18.

⁴⁸ May 19, 2000 “Case Binder,” Part V, Figure 1, responses (footnotes 7-20) to Noise, “Dogs scare the birds away.” ODFW staff confirmed in a May 15, 2000 telephone conversation with WPS staff that wildfowl may initially flush at an unfamiliar sound such as barking dogs, but as the birds realize that no predator is accompanying the sound, they will grow accustomed to the sound and will no longer flush.

⁴⁹ May 19, 2000 “Case Binder,” Part V, Appendix 5, Robert Vetsch, p. 4.

⁵⁰ May 19, 2000 “Case Binder,” Part V, Appendix 5, testimony of Robert Vetsch, David Egger, Dave Kunkel in the Part III, Agricultural Analysis, stating that the kennel noise has no impact on waterfowl. *See also* Part V, Appendix 4, Noise Rebuttal, p. 5, Item 8.

⁵¹ May 19, 2000 “Case Binder,” Part V, Appendix 6, Items 3, 14, 35, 36 and 38.

⁵² May 19, 2000 “Case Binder,” Part V, Appendix 4, p. 9.

allegation that wildlife refuge or game management activities are impacted by barking dogs.

There is substantial evidence in the record that kennel noise has no adverse impact on accepted farm practices and farm dwellings.⁵³ Expert testimony from Al Duble demonstrates that physical improvements to the kennel have reduced the sound of the 75-dog kennel to levels below the sound of 4-10 dogs barking outside.⁵⁴ Therefore, the applicants have demonstrated by substantial evidence that noise from the expanded kennel has a lesser negative noise impact on the surrounding area than existed during the Persinger era.

Vibration, Odor, Fumes, Glare and Smoke Impacts: The kennel does not generate readily detectable levels of vibrations, glare or smoke. Odors and fumes are well-controlled by use of three septic systems for waste disposal.

Dust: Use of the kennel buildings produces no dust. Dust from farming operations in the area is considerably greater than any dust that would be generated from either the previous or expanded kennel operation. All construction activity has already occurred, and no additional construction dust will be generated. Although traffic may increase to and from the kennel, the parking area for the kennel clients and employees has been paved to county standards, whereas the prior parking area was gravel, and therefore more likely to result in dust emissions. Although there may be some increase in dust from increased traffic on the gravel driveway, this slight increase will be compensated for by the decrease in dust in the paved parking area. The evidence indicates there has been no net increase in dust and, if anything, a net decrease with the expanded and improved kennel.

In conclusion, the factors identified in criterion “2” are insignificant in terms of the previous or expanded kennel’s impact on the neighborhood. The Persinger kennel operation had minimal vibration, odor, fumes, glare, dust or smoke impacts on the surrounding area, as does the current Schillereff kennel. Overall, the Hearings Officer finds that the expansion of the kennel produces no increase in these impacts and that dust impacts may have decreased as a result of the installation and use of the paved parking area.

3. The comparative numbers and kinds of vehicular trips to the site.

The applicants have prepared a traffic impact study to assess the quantitative and qualitative differences in traffic between the Persinger kennel (4-10 dogs) and the Schillereff kennel (75 dogs).⁵⁵ Quantitatively, there are more trips generated from a 75-

⁵³ May 19, 2000 “Case Binder,” Part III, Agricultural Analysis.

⁵⁴ May 19, 2000 “Case Binder,” Part V, Appendix 4, Noise Rebuttal, p. 4, Item 2.

⁵⁵ January 25, 2000 “Case Binder,” Appendix 2, Traffic Analysis.

dog kennel than a 4-10 dog kennel. However, the differences are small. Both kennel operations had/have live-in operators, resulting in 10 trips per day (the same as a single family residence). The 75-dog kennel has had an average of 16 vehicle trips per day (8 customers average), versus 2 vehicle trips for a 4-10 dog kennel. Employees at the expanded kennel could generate an additional 4 vehicle trips per day, versus no employee trips (on average) for the 4-10 dog kennel. Thus, the average daily difference is 30 trips for the 75-dog kennel versus 14 trips for the 4-10 dog kennel.

However, this increase in trips (14 per day) amounts to the number of trips typically generated by 1.4 single-family residences. This minor change will not increase levels-of-service for affected streets and intersections beyond the existing LOS B during the evening and Saturday peak hours (the critical traffic period of this use). There will be no increase in the number of trips during the morning peak hour, because the kennel does not open until 9:00 a.m. on weekdays.

Qualitatively, there is a potential impact on agricultural traffic that was addressed in the May 19, 2000 “Case Binder,” Part III, Agricultural Analysis. Testimony from farmers who farm land within the impact area states that the small increase in kennel traffic does not interfere, at all, with farm-related traffic. In fact, there may be some benefit to local farm stands from the small increase in kennel-related traffic.⁵⁶

The only traffic safety issue was raised by John Maring, president of Marquam Farms, who stated that Red Persinger was involved in an accident at the intersection of Reeder Road and the shared kennel/hunt club driveway. Mr. Maring also stated that he once narrowly avoided an accident. He attributed the accident and near miss to inadequate sight distance. The record reveals that the alleged sight distance problem is the result of overgrown vegetation along Reeder Road.

The Multnomah County code apparently contains no adopted sight distance standards. However, the County Transportation Division routinely relies on *A Policy on Geometric Design of Highways and Streets* (AASHTO, 1990) in making sight distance determinations. On April 11, 2000, Lancaster Engineering measured sight distance from the driveway shared with Marquam Farms, and came up with quite different results than Mr. Derr and Mr. Maring.⁵⁷ Lancaster Engineering, a professional traffic engineering firm, measured sight distance from the shared driveway at 425’ to the northeast and 335’ to the southwest along Reeder Road. As discussed in a May 4, 2000 letter to Eric Eisemann of WPS, sight distance is not an absolute measurement – it should be measured in relation to observed traffic speed. Based on a speed survey, Lancaster Engineering determined the 85th percentile speed along Reeder Road to be 48 mph, slightly higher

⁵⁶ May 19, 2000 “Case Binder,” Part III, Agricultural Analysis, p. 18; Part V, Appendix 5, Item 2, p. 1; and Part V, Appendix 6, Item 25.

⁵⁷ Using unsubstantiated techniques, and without an engineering license, Mr. Derr reported sight distances of 250’ and 275’.

than the 45 mph posted speed.⁵⁸ Based on this observed speed, a sight distance of 495' would be required by the AASHTO Manual for the shared driveway. Accordingly, the applicants have now removed blackberries and related growth from the public right-of-way adjacent to Reeder Road, which increased sight distances to at least 500' in both directions, in excess of AASHTO requirements. Removing existing vegetation along Reeder Road has resulted in a net improvement in traffic safety along this stretch of Reeder Road.⁵⁹

From a qualitative standpoint, traffic safety has improved with the kennel expansion over previous conditions, because of improved sight distance. In the Hearings Officer's view, the improvement in traffic safety is significant, whereas the increase in vehicle trips is not. Therefore, the expanded kennel will result in a reduced traffic impact and improved safety – provided that vegetation within the right-of-way is maintained on a regular basis. Therefore, the following condition of approval will be required:

4. The applicant shall regularly control the height of vegetation within the Reeder Road right-of-way so as to maintain a distance of 495' or more in

⁵⁸ See explanation of methodology, May 19, 2000 "Case Binder," Part V, Appendix 3, Traffic Rebuttal.

⁵⁹ Several of the Hunt Club affidavits speak to the issue of sight distance and unsafe access. (Ray, Fahl and Maring). According to Mr. Ray:

"The common entrance to Marquam Farms' and the Persinger's property is located at a very dangerous place on Reeder Road. Because of the curvature of the road at the access point, sight distances are very short. Because the speed limit on the road is 45 miles per hour at that location, the danger presented by the almost blind entrance is exceedingly great. Utmost care must be used in leaving the driveway. This blind intersection resulted in a very serious accident on June 2, 1994, when a vehicle traveling Reeder Road broadsided a truck leaving our driveway. A driver and Mr. Persinger were in the truck. Both sustained serious injuries. I was the first person at the scene of the accident. The traffic hazard created by this blind intersection was exacerbated by the construction of the kennel, which generates considerable traffic, and would be made even worse by the enlargement of the kennel."

Or, according to Mr. Maring:

"The lack of adequate sight distance at the intersection of our driveway and Reeder Rd. is a hazardous condition that should not be worsened by adding additional commercial trips from a kennel. The sight distance is severely limited because of the curve and the foliage. Although the speed limit is 45 mph, most traffic travels at least 55 to 65 mph and faster is not unusual. On a dark, rainy night the visibility is the worst. I have almost been hit 6 times leaving the property, even though I take special precaution. On 2 or 3 occasions the only way I avoided being hit by a speeding vehicle not visible until I pulled out was to accelerate and drive straight across the road into the wildlife viewing parking lot. With the lot I would have been hit or gone off the road."

Much of the vegetation that blocked sight distance to the driveway existed in front of the Hunt Club property and has since been removed.

both directions at the driveway intersection shared with Marquam Farms.

With this condition, the Hearings Officer concludes that the expanded kennel will have a lesser negative impact on the number and kinds of vehicle trips than did the previous 4-10 dog kennel. The benefit will accrue primarily to Marquam Farms, which will have improved sight distance to the driveway shared with Sauvie Island Kennels.

4. The comparative amount and nature of outdoor storage, loading and parking.

Outdoor storage: There is no evidence in the record regarding the amount of outdoor storage associated with the Persinger kennel. All storage associated with the expanded 75-dog kennel will be confined to kennel structures. There is no evidence or reason to believe that impacts from outdoor storage will increase as a result of the kennel expansion. To the extent that outdoor storage may have occurred on the Persinger property in the 1970s and 1980s, there will be a net benefit.

Loading: Loading is not a major factor when it comes to dog kennels. No adverse impacts have been identified from loading activities for either the 4-10 dog kennel or the 75-dog kennel. There is no evidence in the record to suggest that loading impacts from the expanded kennel would be greater than loading impacts from the previous kennel. Current kennel loading activities involve the movement of one or two dogs from a private car to the kennel office building and unloading of supplies. Supplies are unloaded at the door of the southern building or in the agricultural building if it is raining. Prior to the kennel expansion there was no opportunity to unload supplies indoors during inclement weather and loading occurred in unpaved areas. Because loading occurs on pavement or within a structure, whatever impacts exist from loading supplies will be reduced.

Parking: Impacts from parking will be reduced in the expanded kennel because the parking lot is now paved and landscaped, consistent with County design review standards. The 4-10 dog kennel had no defined area for parking, and parking occurred along the shared gravel driveway. Parking now occurs at the south end of the kennel building outside of view of dogs boarded in the kennel, thus reducing the likelihood of barking. For these reasons, the net impact due the changes in the arrangements made for parking will be positive.

5. The comparative visual appearance.

Buildings: The Persinger kennel buildings consisted of two WWII-era Quonset huts. The parking lot was graveled without landscaping. These unattractive Quonset huts have been replaced with a new building, paved parking and landscaping. All testimony in the record that discusses appearance, including that of hunt club members, speaks to the

improved appearance of the expanded kennel.⁶⁰ The record clearly demonstrates that the expanded kennel will have a better visual appearance than the old kennel.

Landscaping: Neither the kennels nor the original house were professionally landscaped. The landscaping around the modern kennel buildings and watchman's residence was designed and installed to County design standards as shown in the 1996 site plan and photographs. The appearance of the site is improved as a result of landscaping.

6. *The comparative hours of operation.*

The Persingers did not maintain any regular hours of operation for the kennel. Generally, people dropped off or picked up their dogs at any time of the day. Kennel activity was greatest during the summer months, special events and hunting season. Sauvie Island Kennels operates from 9:00 a.m. to 6:00 p.m. weekdays and from noon to 4:00 p.m. on weekends.⁶¹ These hours of operation impose not adverse impact on accepted farm practices, rural residential living or hunting activities in the area in any way.

7. *The comparative effect on existing vegetation.*

There is no significant vegetation on the kennel site. When the kennel was remodeled, aerial and other photographic evidence shows that most of the trees on site were retained around the kennels. Most importantly, the existing row of birch trees screening the north face of the kennels has been retained. There is no substantial difference between existing vegetation on the site now and existing vegetation on the site during the Persinger era.

8. *The comparative effect on water drainage.*

There are no appreciable negative changes in water drainage patterns as a result from the expanded facility. The natural hydrology of the area is controlled by a series of drainage channels and dikes. There is no evidence to suggest that the small increase in impervious surface area resulting from site improvements will adversely affect farm operations, hunting or rural residential living in the impact area. Furthermore, County land use regulations require the Schillereffs to control and properly dispose of all drainage.

9. *The degree of service or other benefit to the area.*

The expanded Sauvie Island Kennels produces several benefits to the area. Boarding, and intermittent training and breeding of sporting dogs complements the

⁶⁰ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 19, 22, 23, 26, 39 and 42. *See also* Appendix 5, Item 2, Robert Vetsch, p. 4.

⁶¹ January 25, 2000 "Case Binder," Narrative 3, p. 33.

hunting activities occurring on private property and at the Wildlife Refuge.⁶² The kennel provides employment opportunities on the island.⁶³ There is evidence to suggest that kennel clients purchase farm produce at the fresh market stands on Sauvie Island.⁶⁴ Maintenance of vegetation along the Reeder Road right-of-way has improved traffic safety for David Egger and his workers who farm the hunt club property and for members of the hunt club as well.⁶⁵ The kennel is viewed as an asset by Sauvie Island residents and farmers who depend on the kennel services. It provides a needed facility for rural and urban area dog owners and hunters. The record shows that the expanded kennel operation is supported by virtually all island residents and businesses.⁶⁶ On balance, Sauvie Island Kennels as expanded offer a substantial benefit to the surrounding area when compared with the previous kennel.

10. *Other factors which tend to reduce conflicts or incompatibility with the character and needs of the area.*

The expanded kennel has already taken steps to reduce conflicts and incompatibility with the character and needs of the surrounding area. The greatest potential impact from any dog kennel is noise. The Duble study demonstrates conclusively that noise impacts from the remodeled kennel – in all directions – are less than occurred with the 4-10 dog kennel in its previous state. All parties now agree that the kennel complements hunting activities on the island and that hunting activities support the agricultural economy of the island.

Moreover, required conditions of approval will reduce further the identified conflicts with the hunt club. By limiting the potential for eastern expansion and hunting related complaints, the Marquam Farms hunt club's hunting area will not be restricted. By requiring the applicants to maintain the public right-of-way along Reeder Road, traffic safety will improve for both the hunt club and the kennel.

In conclusion, the expanded Schillereff kennel operation has a lesser negative impact on the neighborhood and no greater adverse impact when compared with the previous Persinger kennels. The new kennel is more attractive, has safer access from Reeder Road, and has been designed to produce less noise than the previous kennel operation. The kennel also provides a useful public service, by training and boarding hunting dogs that support the hunting economy of Sauvie Island. Because the expanded

⁶² May 19, 2000 "Case Binder," Part V, Appendix 6, Items 3, 19, 27-29, 35, 40 and 45.

⁶³ May 19, 2000 "Case Binder," Part V, Appendix 5, Item 2, p. 4.

⁶⁴ May 19, 2000 "Case Binder," Part V, Appendix 6, Item 25; and Appendix 5, Item 2, p. 21.

⁶⁵ May 19, 2000 "Case Binder," Part V, Appendix 3, Traffic Rebuttal, p. 3.

⁶⁶ May 19, 2000 "Case Binder," Part V, Appendix 6, Items 3-6, 19 and 27. *See also* January 25, 2000 "Case Binder," Narrative 3, pp. 34 and 35.

facility is being built in the same location as the previous Quonset huts, no agricultural land has been or will be lost.

C. Expansion through the CUP criteria of MCC 11.15.7120

In Section A, the Hearings Officer determined that kennel operation on the site was a valid nonconforming use, and therefore is “existing” within the meaning of OAR 660-33-130(18).⁶⁷ MCC 11.15.7122 states that applicants for conditional uses listed in MCC .2012 must meet conditional use criteria. The proposed kennel use is listed in MCC .2012(J) as a conditional use. Therefore, the Hearings Officer will now evaluate the proposed expansion of an existing 4-10 dog kennel to the proposed 75-dog kennel against the conditional use review criteria specified in MCC 11.15.7120.

The Hearings Officer notes that Sauvie Island Kennels has already been expanded to serve 75 dogs consistent with County design review approval in DR 1-96. Therefore, the “proposed use” in this case has already been constructed, the proposed improvements have been made, and impacts can be measured based on actual conditions. This “proposed” use or kennel is also referred to as the “expanded” use or kennel.

1. The proposed use is consistent with the character of the area.

In this case, the proposed use – a dog kennel with associated training and breeding – has existed on a continuous basis since 1952. The character of the area is in part determined by the Persinger kennel, as it existed prior to remodeling by the Schillereffs in 1989-90. This conditional use review applies to the expansion of the pre-1990 dog kennel. Therefore, this conditional use review must determine whether the proposed (expanded) kennel use will be “consistent with the character of the area.” The pre-1989 Persinger kennel operation and its characteristics – as well as the expanded Schillereff kennel and its characteristics – are described in Section B, Expansion of the nonconforming use under MCC 11.15.8810.

Nature of Post-1990 Kennel Improvements

The expanded 75-dog kennel incorporates improvements in the design, layout and construction of the kennel consistent with County land use approval. (See January 25, 2000 “Case Binder,” Appendix 1, Prior Land Use Approvals, DR 1-96 and Map 3.) The parking area has been paved and striped, the office area enclosed, and an agricultural building constructed to store a tractor and horse tack. Most significantly, the 40-year old kennel facility with its open runs was enclosed by double walled construction which has the effect of reducing noise to the northeast, south and southwest – that is, in the direction

⁶⁷ OAR 660-33-130(18) provides an exception to the OAR 660-33-110 prohibition of new kennels on high value farmland. This provision reads: “Existing [kennel] facilities may be maintained, enhanced or expanded, subject to the requirements of law.”

of hunting, agricultural and rural residential activities within the impact area. The expanded kennel design faces dog runs towards the center of the enclosed kennel, except on the north side. The Schillereffs have constructed a solid wood sound barrier along the entire north end of the kennel, thereby reducing noise to the wildlife refuge.

As indicated in the second noise study prepared by Al Duble, P.E.,⁶⁸ which has not been contested, noise levels from the 75-dog remodeled kennel will be lower from the remodeled and expanded kennel than from 4-10 dogs in the pre-1990 kennel. This is because the Persinger kennel had open runs, whereas the Schillereff kennel does not.

The applicants commissioned an independent traffic analysis to consider whether the expansion of the dog kennel would adversely affect Sauvie Island traffic safety or levels of service (LOS). Lancaster Engineering found that the effect of increased Sauvie Island Kennel traffic on island roadways is negligible during peak traffic hours and that existing LOS B on County roads would remain unchanged as a result of the expansion. Lancaster Engineering concluded that the difference between traffic generated by a four-dog kennel and a 75-dog kennel is less than one vehicle trip per hour. However, of much greater importance than the slight increase in vehicle trips is the substantial increase in traffic safety that has resulted from removal of vegetation along Reeder Road. As indicated above, this vegetation removal has increased sight distance at the intersection of the shared driveway to the recommended county standard of 495’.

Kennels, hunting clubs and agricultural uses have existed harmoniously together on Sauvie Island for many years. The other two kennels have all these three uses on the same property. With measures to ensure proper handling of dogs, maintenance of kennel facilities, and noise reduction, this criterion can be met.

Impacts on the Character of the Neighborhood

Impacts on agricultural operations within the 1,500-foot impact area are addressed under ORS 215 provisions below.

Sauvie Island is characterized by a combination of agricultural operations, recreational uses (including hunting clubs), sale of agricultural products at roadside stands, and kennels. In addition to Sauvie Island Kennels, there currently are two other commercial kennels on Sauvie Island.⁶⁹ More detailed information regarding agricultural operations within 1,500 feet of the site is found in the May 19, 2000 “Case Binder,” Part III, Agricultural Analysis which are adopted as findings to support this decision.

Sauvie Island is a logical place to board and train hunting dogs, because hunting dogs are used extensively for bird hunting on the island. Sauvie Island is also close to the

⁶⁸ May 19, 2000 “Case Binder,” Part V, Appendix 4, Sound Rebuttal.

⁶⁹ Charlton Kennels is permitted to board 100 dogs; Minoggie Kennels is permitted to board 50 dogs.

Portland metropolitan area, where there are many families with dogs that require kennel accommodations. Many farmers also maintain "duck ponds" for private hunting purposes, so that hunting is a major source of income for island residents. All three kennels on Sauvie Island have adjacent hunt clubs and agricultural operations.

Both Charlton Kennels and Minoggie Kennels conduct their operations *on the same property* as their respective duck clubs, within sight of duck ponds and duck hunters' blinds. Thus, dog kennels and hunting clubs appear to be complementary uses on Sauvie Island. It is common for hunting club members to use the training and boarding services of kennels on the island.

Successive kennel operations have existed in relative harmony on what is now the Schillereff property since about 1952. All neighboring farmers and hunt club owners who testified in this matter support the continued operation of Sauvie Island Kennel at its present location.⁷⁰ Members of various island hunt clubs, including Marquam Farms, use the boarding and training services of Sauvie Island Kennels.

Land uses within the 1,500-foot impact area,⁷¹ are representative of Sauvie Island as a whole. As indicated below, there is a combination of farming operations, publicly owned recreational land, and hunting clubs.

Northwest: The Sturgeon Lake Wildlife Refuge lies across Reeder Road to the northwest and is owned and managed by the Oregon Department of Fish & Wildlife. The refuge area has public access and is used frequently for hunting, bird-watching and hiking purposes. Hunters and hikers often bring dogs. The only adverse impact identified through these proceedings was that noise from barking dogs disturbs bird-watching (and listening) activities. However, the second Doble noise study⁷² determined that noise from the remodeled kennel, with the recently constructed cedar fence, will be less audible to bird-watchers than under pre-1990 conditions. Otherwise, the kennel will have no adverse impacts on the recreational use or wildlife management functions of the refuge, because dogs are not permitted to run free and noise from the kennel is buffered effectively by Reeder Road and the "Big Dike" separating the refuge from Reeder Road.

Northeast: The Marquam Farms Hunt Club lies to the northeast. The hunt club occupies the old Marquam Lake bed which was drained when the island was reclaimed for agricultural purposes. The Hunt Club currently produces feed grains to attract migratory

⁷⁰ Marquam Farms hunt club had opposed the expansion of Sauvie Island Kennels until August 9, 2000. As a result of a settlement agreement with the Schillereffs, Marquam Farms now supports expansion of the kennel operation, subject to conditions adopted in this decision and conditions in the settlement agreement. See August 9, 2000 letter to the Hearings Officer, signed by representatives of both Marquam Farms and Sauvie Island Kennels.

⁷¹ May 19, 2000 "Case Binder," Map #1, Vicinity / Zoning Map.

⁷² May 19, 2000 "Case Binder," Part V, Appendix 4, Sound Rebuttal.

foul. The Hunt Club contracts with a farmer to prepare and plant the land. Large tractors are used in the spring and fall. Wildfowl hunting occurs on this site during hunting season, which usually runs from October through January of each year. The Hunt Club has approximately 30 members. During the hunting season, hunters often arrive early in the morning, which, under present conditions, often causes the dogs to bark. Historically, the Hunt Club had opposed expanded use of the kennel based on:

- potential noise (disturbs club activities and scares wildfowl);
- traffic safety (from increased traffic using the shared driveway and its intersection with Reeder Road);
- hunting limitations (active hunting area may be reduced because of increased human activity on kennel property);
- trespass from kennel owners to hunt club property; and
- lack of adequate sight distance along Reeder Road.

However, based on its review of the kennel use, design and operational plans and conditions of the settlement agreement, Marquam Farms has concluded that “any impacts that may have existed before will be fully mitigated under the Schillereffs’ current proposal.”⁷³ Identified mitigation measures include:

- design of remodeled kennel reduces noise impacts to hunt club;
- removal of vegetation along Reeder Road provides for increased sight distance at intersection with shared driveway, thereby increasing public safety;
- condition of approval limiting future expansion of kennel operations to the east (i.e., towards the shared property line) allows for hunting operations to continue to within 100 yards of parking lot pavement edge;
- Schillereffs have agreed not to trespass on hunt club property without authorization from club president; and
- all now agree that vegetation removal on both the hunt club and kennel properties and their right-of-ways is necessary to ensure adequate sight distance (495’) at the intersection of the shared driveway and Reeder Road.

Based on the above, the Hearings Officer concludes that any potential impacts from the expanded kennel operation on Marquam Farms hunt club have been effectively mitigated.

Southwest: The Vetsch Dairy Farm and the Ray properties are located to the southwest of the kennels. Both parties have consistently supported the expanded proposal and have identified no adverse impacts. Both parties have commented that the expanded kennel operation will benefit island hunting through the boarding, training and breeding of hunting dogs.

⁷³ August 9, 2000 letter from Dan Kearns and Larry Derr to Hearings Officer.

In conclusion, the proposed kennel expansion, including the boarding, breeding and training of dogs, will be consistent with and result in improvement to the character of the neighborhood.

2. *The proposed use will not adversely affect natural resources.*

No inventoried natural resource site exists on the property. The Sturgeon Lake Wildlife Refuge is located across Reeder Road. This refuge has public access and a parking lot with trails. The kennel will have no adverse impact on the refuge. Dogs are not permitted to leave the fenced boundary of the Schillereff property, except when leashed and under the care of a trained handler. This criterion is met because the kennel would cause no adverse impacts on natural resources. As indicated above, noise impacts to the wildlife refuge are reduced with the kennel expansion due to the design of the remodeled kennel and the solid wood noise barrier installed by the applicants along the previously exposed north kennel runs.

Finally, the Schillereffs have completed all physical improvements to the kennel facility to adopted County standards. This includes the installation of additional septic systems to code and compliance with applicable stormwater and erosion control ordinances. The modern kennel facility, unlike the pre-1990 Quonset huts, discharges all dog waste into approved septic systems. For these reasons, the proposal will not adversely affect surface or ground water quality.

3. *The proposed use will not conflict with farm or forest uses in the area.*

There are no forest uses in the area. Agricultural zoning is the norm in the area. The Vicinity Map shows agricultural activities within the 1,500-foot impact area. The May 19, 2000 "Case Binder," Part III, Agricultural Analysis, includes extensive interviews with farmers who actively farm properties within the impact area. Included in these interviews are detailed descriptions of agricultural practices on all properties within the impact area and potential conflicts with these practices. Each of the farmers interviewed (*i.e.*, all farmers in the impact area) state that the expanded kennel operation will have no adverse impacts on their existing or planned farming operations.

Throughout this process, the Hearings Officer notes that there has been extensive testimony from the Sauvie Island Grange, neighboring farm owners, and full-time farmers on Sauvie Island. All agree that there will be no adverse impacts on agricultural operations resulting from the proposed (*i.e.*, constructed) kennel expansion.

Potential conflicts with farm uses include the following:

1. Dogs running free, and frightening or attacking livestock. As noted above, dogs are not permitted to run free. The Schillereffs are experienced dog handlers, and have taken several steps to ensure against dogs escaping from their facility, including:

- Each dog will be confined to a fenced/walled kennel run, which meets the latest design standards for safety and comfort of dogs.
- The kennel area has an additional fence/wall around its entire perimeter, in case a dog escapes during feeding or exercise.
- When boarded dogs are exercised, they remain on a leash at all times. They are not permitted to roam free.
- On-site training of dogs occurs only in the confined pasture area, which is fully fenced and separated from neighboring properties by a blackberry covered drainage canal.

The Hearings Officer notes that there is no history of dogs roaming free or causing damage to livestock in the area. As documented in the record,⁷⁴ neighboring farmers support this application, and testified to the quality and maintenance practices of Sauvie Island Kennels.

2. Barking dogs within the kennel disturbing livestock or disturbing the sleep of farmers living in the area. The letters in Appendix 6 (May 19, 2000 “Case Binder”) attest to the fact that barking dogs have had no adverse impact on rural residents or livestock in the impact area. There is no evidence to indicate that barking dogs within the kennel building disturb livestock in the area. For example, the Vetsch family owns and operates a dairy farm at the south end of the impact area and supports the Schillereffs’ proposal. According to the Rose City Sound study (November 2, 1990), the ambient noise level at the south property line, approximately 500 feet from the kennel, was 42 db. When dogs are “excited” and barking in the kennel, the noise level currently increases only 6 decibels, to 48 db. The decibel level would decrease even more on the other side of the drainage canal, because noise would be buffered by blackberry brambles, trees and distance. With proposed improvements to the kennel (walls and roof cover), the noise level at the south property line is likely to decrease to ambient levels. Since noise events from jet aircraft (82 db) and wild geese (53 db) are common in this area of Sauvie Island, barking dog noise currently has no impact on this livestock operation. Similar conclusions were reached in the two Duble studies, which are a part of this record.

The closest residences to Sauvie Island Kennels are owned by the Ray family (Map 1, Tax Lots 12 and 8), and are located 800 to 1,000 feet away from the kennel itself. The houses are separated from the kennel by an earthen dike and NW Reeder Road. The Ray family provided letters in support of this application, indicating that they do not find noise from barking dogs to be a problem. Moreover, completion of new walls and an insulated kennel roof has further mitigated noise from barking dogs within the kennel, which is now considerably less than passing vehicles on Reeder Road, noise from aircraft, or noise from flocks of geese overhead. Again, the Duble

⁷⁴ Attachment D of the 1995 Application Narrative and May 19, 2000 “Case Binder,” Part III, Agricultural Analysis.

study reports decreases in noise levels resulting from the expanded and remodeled kennel operation.

Aerial Evidence

The aerial photographs also illustrate agricultural activity on the site and surrounding area from 1956 through 1998. The images are instructive. They show that the intensity of use has increased on both the kennel site and the Hunt Club property, but the photographs also show that agricultural patterns of land use in the surrounding area are virtually unchanged. Because the commercial kennel use (from 50-75 dogs) has now been in operation since 1990, aerial photographs provide additional evidence to the effect that the kennel operation has not adversely impacted farming operations within the impact area.

A comparison of the 1,500 foot impact area shown in the 1998 Spencer Gross aerial photograph and the 1956 U. S. Army Corps photograph showing land use patterns prior to the implementation of zoning is very instructive. The lotting pattern is nearly identical. The farm roads are in the same locations. For the most part, the same fields under cultivation in 1956 were cultivated in 1998. The pasture areas appear to be the same. The drainage pattern is unchanged. The only noticeable changes within the impact area are the intensification of the Hunt Club and kennel properties and the construction of a single-family residence along NW Reeder Road to the southwest of the kennel site.⁷⁵ The visual evidence clearly indicates that presence of a dog kennel in the area has not been in conflict with overall farming practices or rural residential uses in the area.

Traffic Impacts

A source of traffic on Sauvie Island is agriculture. Lancaster Engineering evaluated the potential impacts the kennel might have on local traffic. Lancaster concluded that the impact of a 75-dog kennel on local traffic is minimal. The 75-dog kennel will not cause a reduction from the current LOS B on the Sauvie Island roadways. The differential in traffic impacts between a four-dog kennel and a 75-dog kennel is less than one vehicle trip per hour. The result is that traffic generated by the 75-dog kennel will not conflict with farm practices in the area. This is confirmed by interviews with impact area farmers.⁷⁶

Impact on the Marquam Farms Hunt Club

As indicated in the August 9, 2000 letter to the Hearings Officer from attorneys for Marquam Farms and Sauvie Island Kennels, there are no remaining impacts on the Hunt Club from the expanded kennel that have not been mitigated by the kennel design

⁷⁵ The Ray home post-dates the kennel and the residents of the house support the Schillereffs' land use request.

⁷⁶ May 19, 2000 "Case Binder," Part III, Agricultural Analysis.

or conditions of approval, and the conditions of the settlement agreement between the parties.

4. *The proposed use will not require public services other than those existing or programmed for the area.*

The expanded kennels have been constructed consistent with County design review standards, which that adequate public services be provided to serve the site. Utilities and facilities have been provided are consistent with Comprehensive Plan policies 37 and 38. This standard has already been met.

5. *The proposed use will be located outside big game winter habitat area.*

This criterion is not applicable because the kennel is located outside big game winter habitat areas, as mapped by the County.

6. *The proposed use will not create hazardous conditions.*

The kennel operation does not involve the use of hazardous materials or substances. All dog owners must present proof of current vaccinations before they are admitted to the kennel, thus assuring against the spread of disease. Dogs are confined within the kennel area and all waste material is processed on-site according to DEQ regulations.

The subject property is protected from flooding by a dike structure (the “Big Dike”) maintained by the U. S. Army Corps of Engineers. The site is not designated as a flood hazard area by Multnomah County.

Other possible hazardous conditions are runaway dogs and traffic. As noted above, the Schillereffs have already taken steps to ensure that dogs do not run at large. The Schillereffs currently maintain the gravel driveway which serves both the dog kennel and the Hunt Club members. The new parking lot design will reduce driveway congestion and provide ample space for kennel patron parking.

The stormwater collection and management system conforms to existing regulations. The on-site wastewater disposal system has increased from a capacity of 2,500 gallons to 5,500 gallons, and conforms to existing regulations. Improvements to sight distance at the shared driveway with Marquam Farms, and to the parking area, approved in 1996, have reduced the risk of traffic accidents.

7. *The proposed use and project design will satisfy the applicable policies of the Comprehensive Plan.*

The County found the following plan policies to apply:

Comprehensive Plan Policy 9 (Agricultural Land Area) *The County's policy is to restrict the use of (exclusive agricultural) lands to exclusive agriculture and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural lands from inappropriate and incompatible development.*

The kennel satisfies this policy because, as described elsewhere in this application, the kennel is compatible with the agricultural use of surrounding lands, including the agricultural use (pasture) of the remainder of the 9.4-acre parcel. The expanded kennel takes no agricultural land out of production as it is constructed in an area previously committed to kennel use. The kennel facilities have existed for many years, and the design for the 75-dog kennel will not take up any more space than is committed to the existing kennel structures and operations.

Comprehensive Plan Policy 13 (Air, Water and Noise Quality). *Maintain healthful air quality levels in the regional airshed; to maintain healthful ground and surface water resources; and to prevent or reduce excessive sound levels while balancing social and economic needs in Multnomah County.*

The expanded kennel has been designed consistent with this policy. As concluded in the Duble noise study, noise levels in all directions are lower now than the were during the Persinger era. Although barking is inevitable at a kennel or anywhere there are dogs, the facility is separated from the nearest residence on another property by approximately 800 feet.

When balancing social and economic needs, the Hearings Officer notes that the kennel provides a valuable service to dog owners and hunters throughout the County. The rural setting results in fewer conflicts with surrounding uses and a much better environment for kennel services such as dog training, than would be found in most County locations.

The kennel operations create no air emissions. The Lancaster traffic analysis indicates that the increase in kennel operations from 4 dogs to 75 dogs will result in a net increase of less than one vehicle trip per hour, or about the same as 1.4 single family dwelling units. This small increase in traffic which will have a negligible impact on air emissions.

All waste and fecal matter from the kennel is handled in on-site septic systems. All stormwater and wastewater generated by the 75-dog kennel will be captured and controlled in conformance with adopted regulations.

For these reasons, approval of a 75-dog kennel is consistent with Comprehensive Plan Policy #13.

Comprehensive Plan Policy 37 (Utilities) and 39 (Facilities).

This policy is satisfied because there is an adequate private water system (private well) and there is adequate existing electrical and phone service to the property. Required utilities have been provided to the site. The on-site sanitation system collects and processes all animal wastewater in conformance with applicable regulations. The sanitation system is a marked improvement over the original system. The stormwater system collects water in roof drains and sheet flows the water onto the ground, as approved. The proposal is consistent with Comprehensive Plan Policy # 37.

This policy is satisfied because the school district had no comment on the proposal, there is adequate existing fire protection, and there is adequate police protection from the Multnomah County Sheriff's Department.

The essential service providers issued favorable reports in 1995 and those positions are unchanged.

8. *The proposed use and project design will satisfy such other applicable approval as are stated in this section.*

MCC 11.15.7210 sets forth specific design criteria and standards for approval of dog kennels. Since the expanded kennel has received design review approval (DR 96-1), the Hearings Officer concludes that these standards have been satisfied. Criteria related to the siting of kennels are addressed below.

1. ***Location Requirements (MCC 11.15.7210).*** *These uses shall be permitted only in the following areas and only where they will not conflict with surrounding property uses:*
- (a) ***In CFU, F-2, MUA-20, MUF and RR districts or those areas of similar low population.***

The Schillereffs' property is located in an EFU zone on Sauvie Island. It is surrounded by other EFU and MUA-20 uses. Each of these zones requires "low population densities". Dog kennels are specifically listed as a conditional use in the EFU zone. MCC 11.15.2012(B)(11). The County allows the expansion of existing facilities on EFU land. (MCC 11.15.2012(J).)

2. ***Minimum Site Requirements (MCC 11.15.7215)***
- (a) ***Area: Two Acres***

The site in question is approximately 9.4 acres.

- (b) ***Width: Two hundred fifty feet***

The width of the site ranges from 333 feet at the rear of the property line to over 900 feet along Reeder Road.

- (c) ***Depth: Two hundred fifty feet.***

Property depths range from 390 feet to 1,800 feet.

3. ***Minimum Setback Requirements (MCC 11.15.7220) These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an F, R or A district.***

The site and adjacent properties are zoned EFU; therefore this standard is not applicable. The new kennel structure will be 33 feet from the nearest lot line in conformance with other setback requirements. The kennel structure, as approved, is 33 feet from the nearest lot line in conformance with other setback requirements.

4. ***Other Requirements (MCC 11.15.7230)***

These design review standards were satisfied in the County's review of the expanded kennel in 1996 (DR 96-1), including standard (b), below. Because this design review standard provided further information regarding reduced impacts to the neighborhood, compliance is addressed below.

- (b) ***All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered is the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and other public facilities on nearby properties, and other similar factors.***

The new building, which encloses the kennel and runs, provides optimal sound control. This design minimizes adverse impacts to neighboring residential and non-residential properties. The Hearings Officer believes that the new design is a substantial improvement in several respects.

First, one large building has replaced the Quonset huts and incorporates the third building, creating one continuous design unit. Dogs are now taken from their individual pens without ever entering the open courtyard, thereby minimizing noise disruptions. Enclosing the kennels and roofing the runs has helped to eliminate noise since the dogs can no longer witness any activities on the adjacent the Hunt Club property.

Second, mature birch trees and landscaping inside the courtyard have been retained, as have the mature trees to the west of the existing huts. The applicant believes the dogs are more relaxed and quiet in such a setting.

Third, the new design consolidates the kennel parking and office in one location. Therefore, the kennel complex appears more cohesive and of a unified design to those viewing it from nearby properties.

The prevailing winds on this site are from the northwest. Sounds and smells are generally carried by these prevailing winds to the open lands lying southeasterly of the kennel. The nearest residence to the south of the kennel is 1,000 feet away. In a radius of 1,500 feet around the existing kennel there are only three residences (excluding the subject property).⁷⁷

The County approved DR 1-96 and the Schillereffs remodeled the Sauvie Island Kennel in conformance with this code section. The Hearings Officer believes that the remodeled kennel has achieved the noise reduction effect that was intended in 1995.

5. ***Other Approvals (MCC 11.15.7235) The approval authority may request the advice of the County Dog Control Officer, official of humane societies, and veterinarians before approving an application hereunder.***

The record does not indicate that any other approvals are needed.

Statutory Exclusive Farm Use (EFU) Conditional Use Criteria

A. *Impact Area*

The Oregon Legislature recognized the value of siting dog kennels in the County, away from concentrations of people, when it authorized counties to approve kennels as an “alternative use” on agricultural land. (ORS 215.283(2).) As with other alternative uses on EFU land, ORS 215.296 requires each county to review these alternative uses for impacts on agricultural land and practices, and to require conditions where necessary to mitigate impacts.

In determining an appropriate agricultural “impact area,” the principal factor considered was noise from barking dogs. Because dogs are restrained on-site, there are no other probable impacts on agricultural land. There are no forest uses within the impact area. In November 1990, Rose City Sound took decibel readings at three locations on the property, with the following results:

Table 1: Noise Impacts from Barking Dogs⁷⁸

Location	Ambient Decibel Level	Excited Barking Decibel Level
Inside Kennel	64 db	85 db

⁷⁷ May 19, 2000 “Case Binder,” Map #1, Vicinity/ Zoning Map.

⁷⁸ Outside the kennel, passing jets and wild geese (frequent occurrences over Sauvie Island) were measured at 82 db and 53 db, respectively.

Northeast Property Line adjacent to kennel	53 db	68 db
South Property Line	42 db	48 db

Inside the kennel, the sound of excited barking dogs is comparable to a jet flying overhead, at 85 decibels. Thirty feet northeast of the kennel, at the property line shared with the Hunt Club, the sound of excited barking dogs had already decreased dramatically to 68 decibels. At the south property line located approximately 500 feet from the kennel, the sound of excited barking dogs was only slightly louder (48 decibels) than the ambient noise level (42 decibels). The 48 db reading was roughly comparable to honking geese flying overhead, measured at 53 decibels.

The Schillereffs do not have sound pressure measurements at a distance greater than 500 feet. Erring on the side of conservatism, the proposed impact area shown on Attachment A to the 1995 Application Narrative⁷⁹ is 1,500 feet. At this distance, under current conditions, excited barking dogs may be marginally audible. At a distance of greater than 1,500 feet, the Hearings Officer doubts that noise from the kennel would be audible.

The County Board of Commissioners accepted a 1,500-foot radius impact area in 1995. Neither the size of the impact area nor the list of potential impacts that might occur within that area was challenged in previous proceedings. Although a Marquam Farms representative (John Maring) stated that he could hear barking dogs at a greater distance, Marquam Farms has since stated that all potential adverse impacts from the expanded kennel have been effectively mitigated by the project design.⁸⁰

The purpose of the impact area is to evaluate the potentially adverse impacts to accepted farming practices within the impact area. In this case, farming practices within the impact area include raising livestock, raising dairy cattle, cultivating crops, conserving and protecting natural resources, and residential use customarily associated with farm practices.

Table 2 identifies the types of agricultural activities that occur on the tax lots within the impact area. Tax Lot 15 is the Schillereff property. The table begins with Tax Lot 15, Sauvie Island Kennels, and continues in a counter-clockwise fashion.

Table 2: Agricultural Uses Within the Impact Area

Tax Lot	Use	Zoning
15	Pasture / dog kennel conditional use	EFU
14	Cultivating feed and grain crops / hunt club	EFU

⁷⁹ See also May 19, 2000 “Case Binder,” Map #1, Vicinity/Zoning Map.

⁸⁰ August 9, 2000 letter from Dan Kearns and Larry Derr to the Hearings Officer.

	conditional use	
13	Alfalfa / dairy / pasture	EFU
5	Pasture / dairy / farm residence	EFU / CS
8	Pasture / grain crops / farm residence	EFU
12	Farm residence	EFU
6	Pasture / conservation overlay	MUA-20 SEC / CS / FF
5	Wildlife refuge	MUA-20 SEC / CS / FF

The May 19, 2000 “Case Binder,” Part III, Agricultural Impacts, addresses potential impacts on farming operations within the impact area, and concludes that no such impacts exist. This document is adopted as findings that support this decision. The Hearings Officer recognizes the expert testimony of the farmers interviewed in Part III and concurs with their opinions regarding the lack of impacts from the kennel expansion. The Hearings Officer also notes that area farmers have coexisted with Sauvie Island Kennels for 10 years, without identified adverse impacts. Prior to that, since 1952, a higher impact kennel operation had also existed on this site, with no identified adverse impacts to agricultural operations on Sauvie Island.

B. Will not force a significant change in accepted farm and forest practices on surrounding lands devoted to farm and forest use.

The May 19, 2000 “Case Binder,” Part III, Agricultural Impacts, addresses potential impacts on farming operations on accepted farm practices within the impact area, and concludes that no such impacts exist. As noted above, dog kennels have existed harmoniously with agricultural uses on Sauvie Island since the 1950s. In fact, the two other dog kennels on the island are located on the same property as farming operations and hunting preserves. The dog kennel would have no adverse impacts on livestock in the area. The Schillereffs raise several horses on their property, without ill-effect from the dog kennel.

In this situation, the primary commercial farming operation within the designated 1,500 foot impact area is the Vetsch dairy farm, which is separated from the dog kennel by approximately 500 feet *in addition to* an irrigation/drainage channel with dense blackberry bramble on both sides. The Hearings Officer believes, as indicated in the Dubble noise study,⁸¹ that intermittent noise from excited barking dogs has no adverse impact on grazing dairy cattle because this sound is quieter at the property line than migrating geese. Because the Schillereffs confine the dogs to the kennel except when dogs are on a leash, there is little likelihood of dogs “escaping” from the site and chasing cattle. In any case, the Vetsches have not complained of loose dogs during the ten years that Sauvie Island Kennels have operated on the Schillereffs’ property.

The previous kennel design resulted in the sound of excited, barking dogs being audible at the north property line of the Vetsch dairy farm. However, with the new

⁸¹ May 19, 2000 “Case Binder,” Part V, Appendix 4, Sound Rebuttal.

implemented design changes, and recognizing the noise buffering effect of the blackberry brambles adjacent to the drainage channel, the Hearings Officer believes there is no sound impact on the dairy farm. Three recent noise studies have concluded that the Sauvie Island Kennels does not have a significant impact upon farm practices or natural resource conservation.

Although the Hunt Club also has a farming operation, active farming occurs on the parcel to the east of the 39-acre parcel where the club house is located. The Hunt Club is fenced (6 foot cyclone) for the full length of its border with Sauvie Island Kennels, thus preventing dogs from entering the property in the unlikely event one should get loose.

Transportation analysis prepared for this project concludes that the trip generation difference between a four-dog and a 75-dog kennel is less than one trip per hour. The analysis also concludes that neither a four-dog, a 50-dog, nor a 75-dog kennel, will adversely affect the road and intersection LOS B. Therefore, the Hearings Officer believes that the expanded kennel does not cause a significant change in farm use of the island road system.

In addition, the study performed by Al Duple expressly concludes that no additional mitigation measures beyond those approved and implemented under DR 1-95 are necessary to further protect the Hunt Club, a non-farm use, from kennel noise.

C. Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

The May 19, 2000 “Case Binder,” Part III, Agricultural Impacts, addresses potential impacts on farming operations on accepted farm practices within the impact area, and concludes that no such impacts exist. The hearings officer concurs with this conclusion.

Typical farming practices on Sauvie Island include row crops, dairy operations, grains, berries, nursery crops and orchards. Because the dogs are restrained on-site, inside of a kennel, the costs of farming activities do not increase as a result of the kennel expansion. Sauvie Island Kennels has been in business since 1989. Since opening, there have been no reported instances of dogs under the Schillereffs’ care causing damage to crops or livestock on Sauvie Island. With the updated kennel design, noise from the kennel has decreased, and the remote possibility of “escaped” dogs is even less. For these reasons, the expansion of Sauvie Island Kennels does not increase the cost of accepted farm or forest practices within the impact area, or on Sauvie Island. This criterion is met.

There is no testimony in the record stating that the expanded kennel adversely affects accepted farming practices in the impact area or their costs.

All of the substantial evidence in the record points to the conclusion that the Sauvie Island Kennels does not significantly increase the cost of accepted farm practices on surrounding lands devoted to farm or forest use. The kennel has no impact upon the transportation system, no discernable impact upon cattle crops or wild fowl. All sanitation and stormwater systems were installed to adopted County standards. The kennel has not generated a need for additional utility, school or public safety services. Therefore, Sauvie Island Kennels has met and continues to satisfy criteria related to maintenance of Multnomah County's agricultural economy.

V. Decision:

The Hearings Officer hereby approves the applicants' requests for verification of their nonconforming kennel operation and expansion of the capacity of that kennel from four dogs to 75 dogs. The Hearings Officer finds that the Schillereffs had the legal right to operate a 4-dog, noncommercial kennel on the subject property in 1995 at the time they applied for the approvals sought in this matter. The Hearings Officer also finds that the Schillereffs have established a right to expand the grandfathered kennel operation both as an expansion of a nonconforming use and as a conditional use (kennel expansions allowed in all parts of the EFU zone as a conditional use). With the conditional use approval granted by this decision, the Schillereff kennel is now a lawfully permitted land use, not a nonconforming use. The use is approved subject to the following conditions:

1. Future expansion of kennel uses and structures on the site shall not be permitted any further to the east than improvements presently existing on the site.
2. The applicants shall sign an agreement stating that existing and future property owners will not object to hunting activities on the abutting property to the east, provided that shooting does not occur closer than 100 yards from the nearest point of the paved parking area, as currently existing on the site.
3. Conditions 1 and 2 shall be recorded as a restrictive covenant and shall run with the land.
4. The applicant shall regularly control the height of vegetation within the Reeder Road right-of-way so as to maintain a distance of 495' or more in both directions at the driveway intersection shared with Marquam Farms.
5. Any further expansion of the kennel or substantial change in the operation or use characteristics of the kennel shall require new land use approval.

Appeal to the Board of County Commissioners:

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by

those who submit written testimony into the record. A timely appeal must be filed with the County Land Use Planning Division within the time frame provided by law. An Appeal requires a completed "Notice of Review" form and a fee of \$500.00 submitted to the Land Use Planning office. If you wish to obtain a copy of the transcript of the initial hearing (s), the fee is \$3.50 - per - minute [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)]. Instructions and forms are available at the County Land Use Planning office at 1600 SE 190th Ave, Portland, OR 97223, or you may contact the Land Use Planning office at (503)-988-3043, for additional information.

Dated this 18th day of September 2000.

Liz Fancher
Multnomah County Hearings Officer