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MULTNOMAH COUNTY, OREGON

MULTNOMAH COUNTY
PLANNING SECTION

DECISION OF LAND USE HEARINGS OFFICER

Case File: CU 5-96, HV 10-96, SECh 13-96

Proposed Action(s) and Use(s): Conditional Use Permit, Major Variance and Significant Environmental Concern Permit to establish a single family residence (Template Dwelling), barn and arena on property designated Commercial Forest Use (CFU) and Significant Environment Concern (SECh)

Location of Property: 16633 NW Skyline Boulevard (approximate)
T2N, R2W, Section 24, Tax Lot 5 (10.85 acres)

Zoning Designation: Commercial Forest Use (CFU)

Applicant: Land Use Consultants, LLC/Donna Hulme
for Robert Webster

Hearings Officer: Liz Fancher

I. DECISION

The Hearings Officer hereby **DENIES** the Applicant's permit requests based upon the findings of fact and conclusions of law contained in this decision.

II. EXHIBIT LIST

A	Applicant Submittals
A1	Multnomah County General Application, 6/28/96
A2 & 2a	Applicant Response to Approval Criteria, 9/16/96
A3	Site Plan (Exhibit 1 of A-2)
A4	Lenske to Webster Contract - 1/27/85 (Exhibit 15 of A-2)
B	Multnomah County Code
B1	11.15.2042, CFU
B2	11.15.6400, SEC
B3	11.15.8505, Variances

C	Notification Information
C1	Affidavit of Posting, 12/6/96
C2	Notice of Hearing, 11/27/96
C3	Mailing list for 11/27/96 notice
D	Written Public Comments submitted prior to 12/11/96 Staff Report
D1	Letter of Objection from Biospherics Research Corporation
E	Service Provider Forms (Exhibits 5 & 7 of A2a)
E1	Police Services Form
E2	School District Form
E3	Fire District Review
E4	Subsurface Evaluation Report
F	Staff Reports
F1	Report for 12/18/96 Hearing prepared by Robert Hall
G	Other Submittals 12/11/96 to 12/18/96
G1	Moran Letter (undated)
G2	Zagoudis Letter (12/16/96)
G3	Biospherics Research Corp. Letter (12/17/96)
G4	Wilkerson Letter (12/18/96)
G5	Webster-Lenske Purchase Agreement dated 1/27/93
G6	Quitclaim Deed from Skyline Investments, Inc. to Robert Webster dated 5/3/91, with attachments
G7	Tax Assessor Records marked Exhibit 14 (Applicant)
H	Submittals at Hearing
H1	A&T Printout
I	Submittals After Close of Hearing - Applicant
I1	Response to Issues Raised at Hearing of 12/18/96
I2	Response to Opponents' Letters of 12/26/96
J	Submittals After Close of Hearing - Opponents
J1	Zagoudis Letter (12/24/96) with attachments
J2	Zagoudis/Wilkerson Letter (12/26/96) with attachments
J3	Foster Letter (12/21/96)

III. TRACT REQUIREMENT FOR TEMPLATE DWELLING

The Applicant has applied for approval of a template dwelling in the CFU zone. The CFU zone is a forest resource zone. Multnomah County is obligated by Goal 4 and LCDC adopted regulations to adopt regulations for the CFU zone which protect the forest resources found in the CFU zone. In order to meet that obligation, Multnomah County requires that template dwellings be located on a *tract*. MCC 11.15.2052(A). The tract must consist of one or more contiguous *Lots of Record*, as defined by MCC .2062, in the same ownership. In this land use application, the Applicant has not established that the subject property is a tract. The Hearings Officer makes the following findings in support of this conclusion:

MCC 11.15.2052

(A) A template dwelling may be site on a *tract*, subject to the following:

- (1) The lot or lots in the tract shall meet the lot of record standards of MCC .2062 (A) and (B) and have been lawfully created prior to January 25, 1990;

FINDING: The Applicant has failed to establish that the lot or lots in the subject property meet the lot of record standards of .2062 (A) and (B). The lot of record requirements of MCC .2062 are discussed, in detail, below. The Applicant has not established that the subject property was lawfully created prior to January 25, 1990. Tax Assessor records submitted by the Applicant indicate that the current configuration of the subject property was not recognized by the County until 1994 when portions of two other tax lots were consolidated with a 3.31 acre portion of a parcel conveyed to Skyline Investments, Inc. in 1959. The majority of the parcel conveyed to Skyline Investments, Inc. and labeled Tax Lot 5 was conveyed to third parties around 1991, creating the 3.31 acre remainder parcel. This lawful creation requirement is also contained in the lot of record ordinance and is addressed in greater detail below.

MCC 11.15.2045 Definitions

As used in MCC .2402 through .2704, unless otherwise noted, the following words and their derivations shall have the following meanings:

- (H) **Tract** — One or more contiguous Lots of Record, pursuant to MCC. 2602, in the same ownership. A tract shall not be considered to consist of less than the required acreage because it is crossed by a public road or waterway. Lots that are contiguous with a common boundary of only a single point are not a tract.

FINDING: The Applicant has failed to establish that any portion of the subject property is a Lot of Record, pursuant to MCC .2602.

MCC 11.15.2062 Lot of Record

(A) For purposes of this district, a Lot of Record is:

(1) A parcel of land:

FINDING: The Applicant did not attempt to establish lot of record status for the subject property under this subsection of the County code.

- (a) For which a deed or other instrument creating the parcel was recorded with the Department of General Services, or was in recordable form prior to August 14, 1980;**
- (b) Which satisfied all applicable laws when the parcel was created; and**
- (c) Which satisfies the minimum lot size requirements of MCC .2058, or**

FINDING: The subject property does not meet the 80 acre minimum lot size requirement of MCC .2058 as it is 10.85 acres in size.

(2) A parcel of land:

- (a) For which a deed or other instrument creating the parcel was recorded with the Department of General Services, or was in recordable form prior to February 20, 1990;**

FINDING: The Applicant has not submitted a deed or other instrument which created the subject property and that was recorded with the Department of General Service or was in recordable form prior to February 20, 1990. The Applicant also failed to submit a recorded or recordable deed or other instrument executed prior to February 20, 1990 which created a parcel of land within the boundaries of the subject property.

The Applicant submitted a deed dated January 23, 1959 from Charles R and Lillian V. Wilson to Skyline Investments, Inc. which was recorded with the Multnomah County Clerk and which conveys land in Section 24, Township 2 North, Range 2 West of the Willamette Meridian. This deed does not create the subject property as it conveyed land that is no longer a part of Tax Lot 5 (Tax Lot 24 and a portion of Tax Lot 61) and it does not include the southern two-thirds of the subject property. This conclusion is supported by the Tax Assessor's records submitted by the Applicant as page 1 of Exhibit 1 of the Applicant's December 30, 1996 response to the Opponents' letters of 12/26/96, the hearing testimony of Donna Hulme and documents submitted into the record by the Applicant

regarding land use actions on adjoining properties. The Assessor's records show that, after 1959, the shape of the tax lot which now describes the subject property was changed by the deeding of portions of the original lot and by consolidating portions of other tax lots (6 and 7) with the original Tax Lot 5. In 1991, Tax Lot 5 was reduced in size by the Tax Assessor from 29.57 acres to 3.31 acres, with most of the original lot being conveyed to other owners. One of the other owners who received a part of the original Tax Lot 5 in 1991 was Robert Webster. The 3.31 acre remainder of the original Tax Lot 5 is now the northern portion of the subject property. In 1994, 4.0 acres from Tax Lot 6 and 3.54 acres from TL 7 were added to the property, due to the taxpayer's request to consolidate these areas with the 3.31 acre remainder of the original Tax Lot 5. This consolidation created the lot configuration of the subject property in this land use application..

The 1985 purchase agreement between Reuben Lenske and Robert Webster also does not qualify to create a separate lawful lot. The agreement was not recorded and was not in recordable form. In order to be recorded, a deed or instrument conveying land must be acknowledged or proven, ORS 205.130, ORS 93.010, and must contain a valid legal description. ORS 93.600. The Webster agreement was not acknowledged or proven in any way and did not contain a recordable legal description as it referenced tax lot numbers. Further, the agreement was not executed on behalf of the owner of the property, Skyline Investments, Inc. so was "outside of the chain of title" to the subject property and not a valid conveyance of land.

Further, the Applicant has not submitted any deed or other instrument which conveys the 3.31 acre remainder of Tax Lot 5 or the 4.0 acres of Tax Lot 6 or the 3.54 acres of Tax Lot 7 in order to establish lot of record status for those areas of the subject property. As such, no portion of the subject property is a separate lot of record under MCC 11.15.2062 (3) as a group of contiguous parcels or as a tract under MCC 11.15.2045 (H).

(b) Which satisfied all applicable laws when the parcel was created;

FINDING: The Applicant has not established when the subject property was created. At the December 18, 1996 land use hearing, Donna Hulme, the Applicant's representative stated that the parcel was created as a 3.31 acre parcel in 1933 and that the property was then owned by Reuben Lenske of Skyline Investments, Inc. Ms. Hulme's claim is in error in two ways. First, however, as the Tax Assessor's records show that Tax Lot 5 was 29.57 acres in size when created in 1933. Second, the Tax Lot 5 was not acquired by Reuben Lenske or Skyline Investments, Inc. until 1959, as disclosed by the 1959 deed submitted by the Applicant and County Assessor records. At present, only 3.31 acres of the 29.57 acre parcel conveyed to Skyline Investments, Inc. remain a part of Tax Lot

5, as it is presently configured.

Tax Lot 5 was first recognized by the Assessor's Office as being 3.31 acres in 1991, when the portion of Tax Lot 5 located to the west of Skyline Boulevard was transferred to new owners. There is, however, no evidence to establish that the 3.31 acre portion of the subject property was conveyed as a separate parcel prior to February 20, 1990, a legal prerequisite for creating lots of record. Further, there no evidence to show that any portion of the subject property, including portions of former Tax Lots 6 & 7, was ever deeded as a separate lot or as a group with other portions of the subject property.¹

In the 1980s and early 1990s, the Multnomah County zoning ordinances that governed the subject property and former Tax Lot 5 provided that the 3.31 acre portion of Tax Lot 5 located to the west of Skyline Boulevard was a lot of record that could be developed with a dwelling because it was separated from the remainder of Tax Lot 5 by Skyline Boulevard. The zoning ordinances also provided that the portion of former Tax Lot 5 that was located on the east side of Skyline Boulevard (now TL 24) was a lot of record that was eligible to be developed with a dwelling or other qualifying use. Whether this zoning ordinance created lawful separate lots, however, is not relevant to decision of this matter as the Applicant has not produced any legal document executed prior to February 20, 1990 and during the time that the road lot division law was in effect which conveyed the subject property or any portion of that property. Such a document is required by MCC 11.15.2062 (2)(a).

The Applicant and opponents have cited the case of *McKay Creek Valley Association v. Washington County*, 24 Or LUBA 187 (1992) as being relevant to determination of this case. That case does not, however, control decision of this matter as the local law in question in that case did not require that a lot that is proposed for developed be a lawful lot. As the template dwelling ordinance clearly requires that the tract consist of a legal lot of record and the lot of record ordinance requires that the lot comply with the laws in effect at the time of creation, the holding of the *McKay Creek* case does not govern decision of this matter.

The Applicant has also not shown what laws were applicable to creation of the parcel in 1933, the date that the Applicant claims is the date of creation of the subject property. There is also no evidence in the record to establish what laws were in effect in 1959 when Tax Lot 5 was conveyed to Skyline Investments, Inc.

¹The listing of a lot on the Assessor's records as a single unit does not establish lawful lot of record status or that the property is a lawful lot of any type. The listing is made for tax and assessment purposes only.

The Applicant has also failed to establish that the 1991 creation of the 3.31 acre northern portion of the subject property was lawful or in fact occurred prior to February 20, 1990. As a result, it is not possible for the Hearings Officer to find that the parcel satisfied all applicable laws when it was created.

(c) Does not meet the minimum lot size requirements of MCC .2058; and

FINDING: At 10.85 acres, the subject property does not meet the 80 acre minimum lot size specified by MCC .2058.

(d) Which is not contiguous to another substandard parcel or parcels under the same ownership, or

FINDING: The Applicant claims that he is the owner of the subject property. This claim is supported by two unrecorded one page documents which are both labeled "Purchase Agreement." The first difficulty with this claim is that both purchase agreements bind Reuben Lenske to sell Lot 5, whereas the property is and was owned by Skyline Investments, Inc. from 1959 until the present. Mr. Lenske is not and never has been the owner of Tax Lot 5. Skyline Investments, Inc. is a corporation and has a legal identity which is separate and distinct from Mr. Lenske. Nothing in the purchase agreement purport to bind Skyline Investments, Inc., the record owner of the property, to convey the property to Mr. Webster. The obligation is personal to Mr. Lenske. As such, the Hearings Officer finds that the Purchase Agreements did not transfer legal ownership of the subject property to Mr. Webster and that Skyline Investments, Inc. remains the legal owner of the subject property.

The Hearings Officer makes the following additional findings about the purchase agreements to support her finding that Skyline Investments, Inc. rather than Robert Webster is the legal owner of the subject property. The first purchase agreement between Mr. Webster and Mr. Lenske is dated January 24, 1985. This agreement required Reuben Lenske to sell Tax Lot 5 and portions of Tax Lots 6 and 7 to Mr. Webster at any time between January 27, 1985 and January 27, 1995 for the sum of \$150,000 plus 10% interest. The purchase agreement could not be recorded as it uses tax lot references rather than a valid legal description and the description of the land covered by the agreement is unclear. ORS 93.600. The agreement did not obligate Mr. Webster to buy the property during its ten year term. The record indicates that Mr. Webster did not purchase the property by January 24, 1995. As a result, Mr. Lenske's obligation to sell the property to Webster under this agreement has expired.

The second purchase agreement is dated January 27, 1993. This agreement does not contain a legal description of the property to be conveyed to Mr. Webster. It

also does not obligate Mr. Webster to purchase the property. As such, this agreement is an option to purchase, rather than a conveyance of property. The odd inclusion of the right to occupy the property with the option agreement does not, in the opinion of the Hearings Officer, change the fact that the document did not convey any property to Mr. Webster and that no such conveyance has occurred to date. Further, ORS 93.635 requires that all instruments that contract to convey fee title to real property more than 12 months from the date that the instrument is signed be notarized and recorded by the seller within 15 days of sale. If the 1993 purchase agreement did convey fee title to Mr. Webster, as claimed by the Applicant, the agreement should have been notarized and recorded to be a valid conveyance.

The fact that the purchase agreements did not convey ownership of the subject property to Mr. Webster is confirmed by the fact that Skyline Investments, Inc. sold timber on at least the northern 3.31 acres of the subject property to Hampton Tree Farms, Inc. in 1988, after execution of the purchase agreement between Mr. Lenske and Mr. Webster. The 1988 agreement states that Skyline Investments, Inc., not Robert Webster, owns the northern 3.31 acres of the subject property.

The subject property adjoins property owned by Skyline Investments, Inc., as indicated on page 9 of the application. County records confirm that Tax Lot 6 adjoins the subject property and is owned by Skyline Investments, Inc. As a result the subject property does not meet this requirement of the lot of record ordinance.

(3) A group of contiguous parcels of land:

- (a) For which deeds or other instruments creating the parcels were recorded with the Department of General Services, or were in recordable form prior to August 14, 1990;**
- (b) Which satisfied all applicable laws when the parcels were created;**
- (c) Which individually do not meet the minimum lot size requirements of MCC .2058 but, when considered in combination, comply as nearly as possible with a minimum lot size of nineteen acres, without creating any new lot line; and**
- (d) Which are held under the same ownership.**

FINDING: The Applicant has not attempted to establish lot of record status for a group of contiguous parcels of land, under this definition of a lot of record.

IV. VARIANCE

The Applicant requested that a variance be approved to allow him to site his home approximately 120 feet from the western property line of the subject property. This property line is a side lot line and requires a 200 foot setback. The setback criteria of MCC 11.15.8505(A) apply to the variance request and are discussed below.

MCC 11.15.8505(A): The Approval Authority may permit and authorize a variance from the requirements of this Chapter only when there are practical difficulties in the application of the Chapter. A major variance shall be granted only when all of the following criteria have been met:

- (1) A circumstance or condition applies to the property or to the intended use that does not apply generally to other property in the same vicinity or district. The circumstance or condition may relate to the size, shape, natural features and topography of the property or the location or size of physical improvements on the site or the nature of the use compared to surrounding uses.**

FINDING: The Applicant claims that the soils in the area of the proposed site are best suited for well, septic and dwelling uses. The Applicant also claims that use of another location would reduce clustering with existing dwellings and require fill to establish a level area for a mobile home. The Applicant has not, however, established that any circumstance or condition applies to the property or intended use that does not apply generally to other property in the same vicinity or district. The soils which are used as the basis for the requested variance are found throughout the area of the subject property, as shown on the soils map submitted by the Applicant. Further, the soils map indicates that the homesite area chosen by the Applicant is located on Class 7D and 14C soils, not on the 7C soils which the Applicant has established are the most conducive to drainfield use.

- (2) The zoning requirement would restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district.**

FINDING: The Applicant claims that the shape, slope and soils of the subject property restrict its use to a greater degree than other properties but does not explain why this is so. The Applicant claims that relocation of the homesite to another location would require placement of the home in an area subject to ponding and which would require fill to create a level area but does not show that this would not also be a problem on other properties in the vicinity or district. As such, the Applicant has failed to meet his burden of proving compliance with this criterion.

The Hearings Officer notes that the property was filled without the required governmental approval of that activity. The Hearings Officer notes that the fact that the property was filled in this area is what makes it most desirable for a homesite when compared to other areas of the property. If the Applicant had sought homesite approval prior to filling the property, he could

easily have filled the property in a location which would have complied with the setbacks of the CFU zone.

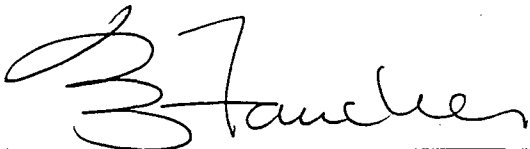
- (3) **The authorization of the variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or district in which the property is located, or adversely affects the appropriate development of adjoining properties.**

FINDING: There is no evidence in the record to indicate that approving the variance would be materially detrimental to the public welfare or injurious to property in the vicinity or district in which the property is located or that the variance would adversely affect the appropriate development of adjoining properties. The adjoining property owner who would be affected by the variance supports approval of the variance. It is reasonable to infer that the neighbor would not support the variance if it would be detrimental to their property.

- (4) **The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor will it establish a use which is not listed in the underlying zone.**

FINDING: Allowing a home to be located within 120 feet of an agricultural use will not adversely affect the County's realization of the Comprehensive Plan nor will it establish a use which is not allowed in the underlying zone. Dwellings are allowed as a conditional use in the CFU zone.

Dated and signed this 9th day of January, 1996.

A handwritten signature in cursive script, appearing to read "Liz Fancher", written over a horizontal line.

Liz Fancher, Hearings Officer
Multnomah County