



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date:

Department: Agenda Planning Date: Time required:

Audio/Visual aids

Contact: Phone:

Department Head Signature:

TITLE

Issue, Description & Background

This is a request is to divide a 9.7 acre parcel in a Special Agriculture zone into three parcels under a Measure 49 approval. On May 9, 2018, the planning director issued a decision approving the request subject to conditions. The applicant appealed that decision to the hearings officer who conducted a public hearing on June 21, 2018, and on August 29, 2018, issued a decision denying the request. On September 13, 2018, the hearings officer's decision was appealed to the board of commissioners.

The appeal of the planning director's decision was based on two conditions related to road improvements that applicant objected to. Condition 3A required the applicant to obtain safe vehicle access including adequate sight distance at the intersection of O'Brien Avenue and Jory Hill Road. Condition 3C required the applicant to improve O'Brien Avenue to public works' standards from the intersection of Jory Hill Road to the northern property line of the subject property. Although the appeal was based on the conditions, the hearings officer considers the entire application.

The hearings officer explains in finding 8.2 (page 7) that health and safety provisions are not exempt from Measure 49 waivers. In finding 13 (page 14) the hearings officer discusses the contested conditions and states that the O'Brien Avenue safety standards are not currently met but also are not waived under the Measure 49 order. The hearings officer concludes that based on the evidence in the record she cannot make sufficient findings to justify conditions A and C, but also cannot approve the application if public safety standards cannot be met.

In the appeal, the applicant argues that the hearings officer's conclusion that public safety requirements are not met is unfounded and that the decision should be reversed. That, in denying the application the hearings officer made engineering and design findings without the benefit of detailed design analysis and relied on inaccurate information on what was required of previous developments having the same impacts on the same streets. Applicant argues that in the previous partition across the street, Partition Case 04-018, sight distance and road improvements were not required and that there are no new or changed circumstances to warrant the conditions in this case and that the impacts of two additional dwellings do not support the exaction of the conditions. The applicants state they are willing to widen the paving on O'Brien from Jory Hill Road to point of access to the properties as long as right of way exists and will widen the gravel portion of the west side of O'Brien Avenue along their property frontage.

Staff confirmed with the applicant's attorney that if the appeal is accepted they will extend the 150 day decision making deadline, and they have hired an engineer and expect submit additional information for the board to consider at the hearing.



MARION COUNTY BOARD OF COMMISSIONERS

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Financial Impacts:

None.

Impacts to Department & External Agencies

None.

Options for Consideration:

1. Accept the appeal and remand the matter back to the hearings officer.
2. Accept the appeal and schedule a public hearing.
3. Deny the appeal, thereby upholding the hearing officer's decision denying the request.

Recommendation:

Staff recommends the board of commissioners accept the appeal and schedule a public hearing.

List of attachments:

Appeal to Marion County Board of Commissioners
Hearings officer's decision denying the request
Appeal of planning director's decision
Planning director's decision

Presenter:

Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to:

Joe Fennimore, gfennimore@co.marion.or.us

RECEIVED

BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY

18 SEP 13 12:53

In the Matter of the
Partition Application of:

MARCELLA O'BRIEN

For Property Approved For Partition Pursuant to
Measure 49 By Marion County In Case No. E130110

Case No. P 18-011

Clerk's File No.

**On Appeal Of Hearing Officer's
Denial Of Partition Application
After Staff Approval**

Marcella O'Brien appeals the Hearings Officer's denial of the Partition Application approved by the Planning Director on May 9, 2018. Ms. O'Brien appealed two of the conditions of approval which required road improvements not required of other property owners who divided and developed their properties using the same streets for access. On appeal, the Hearing Officer (who only disclosed at the close of the hearing that she lives less than one-half mile from the property) denied the previously approved application in its entirety. This appeal results.¹

The property is located at 6435 O'Brien Ave. S., Salem, Oregon 97306. The application seeks to partition the 9.7 acre parcel into three lots, two of which will be two acres, and the third 5.7. As the Planning Director concluded, and the evidence will demonstrate, the application meets all the required conditions, and the two conditions regarding road improvements appealed are not necessary or justified. If the conditions were necessary or justified, they would have been applied to other properties recently divided and developed using the same roads for access. They were not.

Accordingly, the Hearing Officer's conclusion that MCC 17.172.320 public safety requirements are not met is unfounded and the denial of the application should be reversed, and the Planning Director's prior approval reinstated with the appealed conditions deleted.

I. BACKGROUND

On April 3, 2018, Marcella O'Brien (the "Applicant") submitted a complete Partition Application (the "Application"), seeking to partition 6435 O'Brien Ave. S., Salem, Oregon 97306 (the "Property"). The Property was the subject of Measure 37 and Measure 49 claims, which were approved, allowing up to two additional home sites on the Property. The Applicant sought to divide the 9.7 acre parcel into parcels containing 5.7 acres, 2.0 acres, and 2.0 acres.

The Marion County Planning Director approved the Application in its Notice of Decision with certain conditions. Most relevantly, the conditions included the following:

Condition 3(A): The Applicant shall meet all life, safety, and health-related requirements prior to any permits being issued for access, development, or increased usage to the parcels, which will include, but not necessarily be limited to, obtaining safe vehicular

¹ This Statement of Appeal highlights the issues that result in the appeal and the basis for the appeal. Given the nature of the decision and the issues it creates, the Applicant is not able to present all evidence and argument that support overturning the decision and the deletion of the conditions

access in accordance with the County standards regarding adequate Intersection Sight Distance (“ISD”) at the intersection of O’Brien Avenue and Jory Hill Road.

Condition 3(C): Prior to plat approval, under a PW Engineering Permit, widen O’Brien Avenue paved and gravel sections from Jory Hill Road to the subject property north property line to meet the Marion County Local road standard, including any necessary related drainage earthwork. These conditions were requested by PW Engineering in its memorandum recommending denials of the Application.

The Applicant appealed the conditions because, in part, they were not imposed on prior properties that were divided and developed that use the same roads for access. Thus, the effect of the conditions was to impose on the Applicant requirements not made of identically situated properties that will have the same impacts on the same roads. Further, given the scope of the improvements required to meet the standards, the exactions sought are impermissibly disproportionate to the impacts that might result from the creation of two lots, and could make the project economically unviable.

Applicant’s appeal was heard by the Marion County Hearing Officer. The Hearings Officer opened and conducted the hearing without disclosing any conflict or ex parte contact. Just prior to the close of the hearing, the Hearing Officer noted that she lives near the Property – without disclosing how close.² Rather than affirm the conditions imposed by the disinterested Planning Director, the Hearing Officer concluded on the limited and apparently inaccurate record before her, that public safety standards could not be met and denied the application.

In denying the application, the Hearing Officer made engineering and design findings without the benefit of detailed design analysis. In doing so, the Hearing Officer relied on inaccurate information as to what was required of prior developments having the same impacts on the same streets. Further, the Hearing Officer’s decision is inconsistent with current uses and requirements imposed on properties currently under development and having the same impacts on the same streets.

As such, the Hearing Officer’s decision is contrary to the record, and should be reversed, and the Planning Director’s prior approval reinstated with the two challenged conditions deleted.

II. ARGUMENT

The Hearing Officer’s decision denying the application and the conditions imposed by the Planning Director are contrary to prior decisions, made with the same information in hand, regarding properties using the same roads for access that will have the same impacts as the proposed partition. Although prior safety concerns were expressed by Public Works for development on O’Brien Avenue, property divisions and construction of new homes proceeded without seeking the requirements sought to be imposed on the applicant. Further, residential and commercial uses are currently having the same impacts on the same roads. Thus, the conditions already exist as a result of existing uses and requiring Applicant to correct the problem at this stage is a disproportionate exaction.

² Investigation revealed the Hearings Officer lives less than one-half mile from the property and residents of the existing parcel, and therefore any division of it, are likely to drive by the Hearing Officers’ home if they travel from the property into Salem. This information was not disclosed by the Hearing Officer to the parties.

As a result, the Application should be approved with the Conditions deleted.

- a. The Applicant Should Receive the Same Approval with Same Conditions Applied to Other Partitions and Resulting Development Having the Same Impacts on the Same Roads.

The Applicant's partition request is consistent with present uses in the area. The Property across the street, 6444 O'Brien Ave. S., Salem, Oregon 97306, was recently divided into two parcels. This partition is complete, and a home is under construction on the newly created parcel. Both the Parent Parcel, and the new parcel take their access off O'Brien Avenue, as Applicant's parcels would.

Public Works provided substantially the same comments regarding the division of 6444 O'Brien Avenue as were provided in response to this Application. However, the approval of the division of 6444 O'Brien property noted the Public Works comments, but did not impose conditions requiring compliance with them.

The Notice of Decision is attached hereto as Exhibit A. Relevantly, Marion County Public Works commented that partition will result in additional traffic and that the owner of the 6444 O'Brien Avenue property should be required to (1) provide minimum stopping sight distance to the intersection of O'Brien Avenue and Jory Hill Road, and (2) improve O'Brien Avenue to meet local rural street standards, including widening the street to a 22-foot wide paved section with a 5-foot gravel shoulder. Despite Marion County Public Works proposing these conditions, the Planning Director did not impose these conditions as part of the approval of 6444 O'Brien Avenue property.

Given the substantially similar circumstances existing between the properties, if 6444 O'Brien Avenue satisfies Marion County requirements for sight distance or street standards, then it is inarguable that the Applicant's Property equally satisfies such requirements. There are no new or changed circumstances existing in the area requiring a higher burden for approval and given the current uses in the area, there is no rational basis for enforcement of such a costly condition. The County's approval of 6444 O'Brien Avenue's partition application should act as a roadmap for the determination of the present Application.

- b. The Impacts Do Not Support the Exaction.

The partition will result in two additional lots for two additional single family residences. O'Brien Avenue already provided access to 6 homes, and serves as the access to a Christmas tree farm³ that operates a seasonal beer tasting garden using O'Brien as its access.

Although the intersection of O'Brien Avenue and Jory Hill Road is far from ideal, it is already serving these existing uses under its current conditions. Further, the approval of the division and development of 6444 O'Brien Avenue added one single family residence to the properties using O'Brien Avenue as access without requiring any improvements.

³ Tucker Tree Farm operates a Christmas tree farm that offers weekend beer tastings using O'Brien Avenue as its access. Attached hereto as Exhibit B is Tucker Tree Farm's website evidencing their operations. Such use invites the public to O'Brien Avenue and increases traffic during the winter when road conditions are less than ideal.

The addition of just two single family homes to the uses currently using O'Brien Avenue as their access will not have an impact that justifies the expense that may be required to bring the existing intersection up to the standard Public Works wants it to achieve.

c. Conditions 3(A) and 3(C) should not be applied to the Property

The Hearing Officer stated in her decision that Condition 3(A), which addresses site lines at the intersection of O'Brien Avenue and Jory Hill Road, is vague, does not define what work would be required of Applicant, and the established standards may never be achievable. She further provided that the condition would potentially require Applicant to spend an untold amount of money. Based on current uses on O'Brien Avenue, recent approvals to partition other property on O'Brien Avenue without requiring road improvements, and the fact that adding two dwellings will not result in traffic impacts justifying exacting a substantial road reconfiguration from the Applicant, Condition 3(A) should not be applied to the Application.


As to Condition 3(C), applicant is willing widen the paving on O'Brien from Jory Hill Road to point of access to properties that will result from the partition on west side of the street so long as the right of way exists. Applicant is further willing to widen the gravel portion of the west side of O'Brien Avenue and provide drainage on Applicants frontage. Widening of O'Brien on the east side is an improvement that should be made by the parties that divided and are developing the properties on the east side of O'Brien Avenue.

III. CONCLUSION

Conditions on O'Brien Avenue have not changed since 2004 when the partitioning of 6444 O'Brien Avenue was approved without conditions requiring road improvements. Since then, a new home is under construction without the requirement of road improvements. The addition of 2 new residences will not alter conditions to such a degree as to require the extensive reconstruction of the intersection Public Works seeks to impose on the Applicant. Conditioning a three lot partition on such extensive road improvements represents a disproportionate and impermissible exaction.

Accordingly, the Hearing Officer's denial should be reversed, and the Planning Director's prior approval reinstated with condition 3(A) related to reconfiguration of the existing intersection deleted, and condition 3(C) modified to require paving only on the west side of O'Brien to the access on the Applicants property to the extent there is, or applicant dedicates right-of-way, and graveling of the west side of O'Brien along applicant's frontage only.

Dated this 12th day of September, 2018.



Arash Afshar, OSB No. 153048
Mark C. Hoyt, OSB No. 923419
Of Attorneys for Applicant

NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR, OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST PROMPTLY BE FORWARDED TO THE PURCHASER.

**NOTICE OF DECISION
PARTITIONING CASE NO. 04-18**

APPLICATION: Application of Kenneth Ryder to divide a 22.98-acre parcel into two parcels containing 20.03 acres and 2.95 acres each in an AR (ACREAGE RESIDENTIAL) and SA (SPECIAL AGRICULTURE) zone located at 6444 O'Brien Ave. S. Salem. (T8S; R3W; Section 20A). Lot 800.

DECISION: Notice is hereby given that the Planning Director for Marion County has **APPROVED** the above-described Partitioning application subject to certain conditions.

EXPIRATION DATE: This approval is valid only when the final partitioning plat is recorded by **July 6, 2006**. After recording the final partitioning plat, the applicant shall provide proof of the recording to the Planning Division. This can be either a copy of the recording fee receipt or a copy of the plat showing the County Clerk's stamp. The effective period of an approved application may be extended for an additional year subject to approval of an extension (Extension form available from the Planning Division). **Additional extensions may not be granted if the regulations under which this decision was granted have changed since the original approval.**

WARNING: A decision approving the proposed division or use is for land use purposes only. Due to septic, well, and drain field replacement areas, these parcels may not be able to support a dwelling. To be sure the subject property can accommodate the proposed use the applicant needs to check with the Building Inspection Division, (503) 588-5147.

This decision does not include approval of a building permit.

CONDITIONS: The following conditions must be met before a building permit can be obtained or the approved use established:

1. Prior to issuance of any building permit(s), the applicant shall submit a final partitioning plat to the County Surveyor's Office (5155 Silverton Road NE; (503) 588-5036). Following plat approval, the plat shall be recorded with the Marion County Clerk (final plat instructions and example enclosed).
2. The applicant is advised that a Partition Plant Service Report, from a title company, will be required upon submission of the final Mylar to the County Surveyor.
3. Prior to submitting the final partitioning plat, the applicant shall obtain an approved septic site evaluation from the Marion County Building Inspection Division on all undeveloped parcels. **The applicant is strongly encouraged to contact the County Building Inspection Division, (503) 588-5147, regarding septic sites before having the property surveyed. Septic site requirements may affect the proposed property line or lot locations.**

4. The applicant shall show sufficient dedicated right-of-way along the Jory Hill and O'Brien road frontages and intersection as outlined in the Findings and Conclusions section of this report - Marion County Public Works' comments, items 3, 4, 5, and 6. The dedications shall be shown on the plat.
5. The applicant shall meet the following conditions recommended by Marion County Department of Public Works, to their satisfaction [contact person is Matthew Hendrick at (503) 584-7714]:
 - “1. Prior to plat approval, the applicant shall submit a site drainage plan.
 2. Prior to plat approval, the applicant shall obtain approval of the engineering plans from Marion County Public Works and any other concerned agencies.
 3. Prior to plat approval, the applicant shall submit proof of financial capability for all public street and storm drainage improvements inside the County right-of-way.”
6. Prior to issuance of building permits for the resulting 2.95-acre parcel the applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. This statement shall be recorded by the applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director (Declaratory Statement enclosed).
7. A special dwelling setback of 100 feet shall be maintained from the north and east property lines and from the south right-of-way line of Jory Hill Road.
8. Prior to issuance of building permits, the applicant shall sign and submit an SGO Declaratory Statement to the Planning Division for each resulting parcel. This statement shall be recorded by the applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director (Declaratory Statement enclosed).

ADDITIONAL CONDITIONS: Once the approved use is established the following conditions must be continually satisfied:

9. After the final Partitioning plat has been recorded no alteration of property lines shall be permitted without first obtaining approval from the Planning Director.

OTHER PERMITS, FEES, AND RESTRICTIONS: This approval does not remove or affect any covenants or restrictions imposed on the subject property by deed or other instrument. The proposed use may require permits and/or fees from other local, State or Federal agencies. This decision does not take the place of, or relieve the responsibility for obtaining other permits or satisfying any restrictions or conditions thereon. It is recommended that the agencies mentioned below be contacted to identify restrictions or necessary permits. The applicant is advised of the following:

10. The applicant should contact the Salem Suburban Fire District and obtain a copy of the District's Recommended Building Access and Identification Guidelines. For personal and property safety it is recommended that the applicant follow these guidelines. Fire District access standards may be more restrictive than County standards.

APPEAL PROCEDURE: The Marion Rural Zoning Ordinance provides that certain Partition applications be considered first by the County Planning Director. If there is any doubt that the application conforms with adopted land use policies and regulations the Director must condition or deny the application. Any interested person who disagrees with the Director's decision may request that the Marion County Hearings Officer consider the application after a public hearing. The applicant may also request a reconsideration (one time only and a fee of \$200) on the basis of new information subject to signing an extension of the 150-day time limit for review of zoning applications.

A public hearing is held on appeals subject to the appellant paying a \$250.00 fee. Requests for reconsideration, or consideration by the Hearings Officer, must be in writing (Appeal Form available from the Planning Division) and be received, together with the appeal fee, in the Marion County Planning Division, 555 Court St. NE, 2nd Floor, Salem, by 4:30 p.m. on **July 6, 2004**. Please note an appeal directly to the Land Use Board of Appeals is not allowed under ORS 197.830. If you have any question about this application or the decision please call 588-5038 or visit the County Planning Office at the above address. This decision is effective on July 7, 2004 unless further consideration is requested.

FINDINGS AND CONCLUSIONS: The findings and conclusions on which the Director based his decision are noted below.

1. A portion of the subject property, approximately 20.03 acres, is designated Special Agriculture in the Marion County Comprehensive Plan (MCCP) and is correspondingly zoned SA (SPECIAL AGRICULTURE). The remaining 2.95 acres is designated Rural Residential in the MCCP and is zoned AR (ACREAGE RESIDENTIAL). The property is also located in a Significant Groundwater Overlay (SGO-5) zone.
2. The subject parcel is located on the northeast corner at the intersection of O'Brien Avenue S and Jory Hill Road S. The property obtained its present configuration as a result of Zone Change/Comprehensive Plan Amendment/Farm Dwelling/Lot Line Adjustment Case No. 89-8 (ZC/CP/FD/LLA89-8). This case changed the zone on a portion of the subject property from AR to SA and approved the existing dwelling in the newly zoned SA portion of the lot.
3. Surrounding properties to the east and west adjacent to the north side of Jory Hill Road SE are zoned AR and contain rural residences. Property to the east is zoned FT (FARM TIMBER) and in forest use. All other surrounding properties are zoned SA with a mix of uses consisting of smaller parcels in residential use and larger parcels being farmed.
4. The applicant proposes to divide a 22.98-acre parcel into two parcels containing 20.03 acres and 2.95 acres each. The proposal will divide the property along the existing zone boundary line and create a 2.95-acre parcel available for development of a single-family residence.
5. Marion County Department of Public Works reviewed the proposal and provided the following comments:

“Approval of the proposal will create an additional home site on the subject property resulting in additional traffic on O'Brien Avenue Road. The Public Works Department has the following comments, requirements, and recommendations for the proposed partition:

1. O'Brien Avenue is currently a non-county maintained road that serves nine parcels. It does meet County standards for a local road. The applicant shall improve O'Brien Avenue to the County's local rural street standards, including widening the street to a 22-foot wide paved section with 5-foot gravel shoulders and storm drainage approximately 100-feet starting from the northerly side of Jory Hill Road. Tapers or transitions shall be constructed to join with existing gravel access road.
2. It is the County's policy to allow access onto County roads in a manner and location that will protect the public safety. Any new driveway accesses shall be located on O'Brien Avenue a minimum distance of 100-feet from Jory Hill Road.
4. Per the Rural Zoning Ordinances of Marion County, Oregon, the applicant shall show sufficient dedicated right-of-way on the plat to provide the public dedicated right-of-way half width of thirty feet along Jory Hill Road. This is the standard right-of-way half width for a local street. It appears that five feet of additional width is required. Any dedications shall be to the public, not Marion County.
5. Per the Rural Zoning Ordinances of Marion County, Oregon, the applicant shall show sufficient dedicated right-of-way on the plat to provide twenty-foot property corner radii at the intersection of Jory Hill Road and O'Brien Avenue. Any dedications should be to the public, not Marion County.
6. Per the Rural Zoning Ordinances of Marion County, Oregon, the applicant shall show sufficient dedicated right-of-way on the plat to provide the public dedicated right-of-way width of sixty feet for first 100-feet along O'Brien Avenue as measured from the new right-of-way line along Jory Hill Road. This is the standard right-of-way width for a local street. It appears that thirty feet of additional width is required. Any dedications shall be to the public, not Marion County.
7. Per the Rural Zoning Ordinances of Marion County, Oregon, the applicant shall show sufficient dedicated right-of-way on the plat to provide the public dedicated right-of-way half width of thirty feet for the remainder of the property frontage along O'Brien Avenue. This is the standard right-of-way half width for a local street. It appears that fifteen feet of additional width is required. Any dedications shall be to the public, not Marion County
8. The applicant shall provide the minimum stopping sight distance at the intersection of O'Brien Avenue and Jory Hill Road. Sight distance restrictions inside the county right-of-way along Jory Hill Road shall be removed. This shall be addressed as part of the engineering plans review process.
9. In accordance with Marion County Driveway Ordinance #651, driveway permits will be required for any new access or change in existing access to

the public right-of-way. Through the building permit process, the applicant shall be required to apply for a driveway permit.

10. Prior to plat approval, the applicant shall submit a site drainage plan that includes existing contours or show natural drainage courses that are indicated by arrows pointed in the direction of flow and how the applicant proposes to discharge roof runoff from the site.
11. Site grading shall not impact surrounding properties in a negative manner. Construction of improvements on the property shall not block historical or naturally occurring runoff from adjacent properties.
12. Storm water runoff from O'Brien Avenue will not be allowed to flow onto Jory Hill Road. This shall be addressed as part of the engineering plans review process.
13. Public street and storm drainage improvements shall be built to Marion County Engineering and Construction Standards. Storm drainage shall be discharged to a suitable outlet and, where applicable, evidence provided that an adequate easement exists for transit of the water to such an outlet.
14. Storm detention will not be a requirement at this time. If the parcels are partitioned or further developed in the future, storm detention will be required for the parcels. The system shall be sized so that it will detain the difference between a 5-year frequency storm with pre-development conditions (before the Partition Case P04-18) and a 10-year frequency storm with development conditions.
15. The applicant shall submit three sets of engineering plans for the required improvements. A registered professional engineer in the state of Oregon shall stamp the plans.
16. The applicant shall obtain approval of the engineering plans from Marion County Public Works and any other concerned agencies. The applicant shall be required to provide evidence of submission of plans to the applicable utilities before final approval is given. If there is any utilities located in the existing right-of-way that Marion County determines must be moved in order to construct the required public improvements, Marion County can coordinate to have them moved at no charge to the developer. Early coordination is required to meet the utilities' construction schedules.
17. A Major Construction Permit is required before construction of roadway and drainage improvements may commence.
18. Prior to plat approval, the applicant shall submit proof of financial capability for all public street and storm drainage improvements inside the County right-of-way. The financial capability will be based on an engineer's cost estimate from an approved subdivision engineering plans from Marion County Public Works. Any required street and/or storm drainage improvements that are not constructed within three-years of the

approved Major Construction Permit shall be grounds for Marion County to call in the financial guarantee to complete the project.

19. The subject property is within the unincorporated area of Marion County. Transportation and Parks Systems Development Charges shall be assessed upon development of the home on the newly created parcel at the time of application for building permits.
20. Any utility work in the public right-of-way will require a utility permit from Public Works.
21. Prior to obtaining any building permits, the applicant shall have the partition plat recorded.”

Marion County Surveyor's Office indicates that parcels 10 acres and less must be surveyed. Per ORS 92.050, a Plat must be submitted for review along with required fees and a Plant service report and/or title report.

Marion County Tax Department indicates that any delinquent taxes and interest as well as any taxes, which have become a lien during the tax year, must be paid prior to a partition plat being recorded.

All other contacted agencies either failed to respond, or stated no objection to the proposal at the time this report was written.

6. Chapter 181 of the MCRZO establishes provisions for partitioning property in a SGO zone. In the SGO-5 zone the threshold parcel size is five acres. In this instance the average parcel size is 11.49 acres. Although no further study was required, a water use inventory was conducted for this proposal on April 26, 2004. The inventory results were adequate to satisfy the requirements outlined in Chapter 181 of the MCRZO.

Although no additional study is necessary, the County requires a Declaratory Statement be recorded with the property deed. This notifies the applicant, and subsequent owners, that there may be long term groundwater supply problems and that the County is not responsible for deepening or replacing wells.

7. The proposal is to divide the property along the zone boundary and all the SA zoned lands will be contained in the proposed 22.98-acre parcel. Since a new parcel is not being created in the SA zone, only the criteria for creating an AR zoned parcel will be discussed.
8. Marion County Comprehensive Plan policies for rural residential areas provide that homesites should be a minimum of 2 acres in size. The proposed 2.95-acre parcel meets this standard. In addition, the parcel appears to be of sufficient size to comply with the Ordinance development standards.
9. Under MCRZO 128.050 the AR zone contains special siting standards for placement of dwellings near resource zones. Those that apply in this instance are:
 - (a) Any new dwelling in an AR zone shall be required to maintain a special setback from any parcel in the EFU, SA, FT, or TC zones when necessary to minimize

potential conflicts with farm or forest uses. A 100-foot setback is the standard adjacent to farm use and 200 feet is the standard adjacent to forest uses.

- (b) The owner of a proposed dwelling to be located within 500 feet of the EFU, SA, FT, and TC zones shall be required to concur in the filing of the Declaratory Statement prescribed in the respective resource zone.

Conditions of approval will require that a Declaratory Statement be recorded with the property deed because the subject property is adjacent to a resource zone. Also, a special dwelling setback of 100 feet shall be maintained from the north and east property lines and from the south right-of-way line of Jory Hill Road.

- 10. Based on the above and subject to the required agreements, the proposed partitioning complies with the criteria and is, therefore, **APPROVED**.

James Sears
Director-Planning Division

Date: 06/24/04

If you have any questions please contact Joe Fennimore at 588-5038.



Tucker Tree Farm

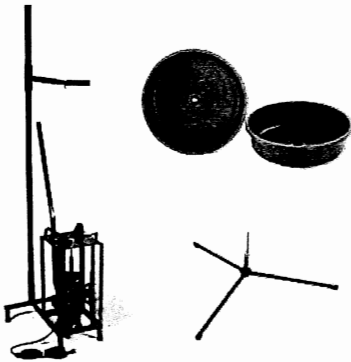
S. Jory Hill Road
to O'Brien Ave.
503.931.4115

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Welcome to Tucker Christmas Tree Farm

Open every year the day after Thanksgiving.

Introducing Our New Drill Machine



Fast and easy. Saves time and labor! We simply drive the spike stand into the base and the trees are ready to be displayed. Rebar stands and bowls are available as well. Click on the image to see a larger view.

Growler fill and beer tasting every weekend 12-5.

Along with the warm fire, and hot cider, cookies and candy canes, we have assistance with cutting and loading. We provide a wreath machine for you to use or we have a wreath maker on site every weekend.

We look forward to having you come out and enjoy the holiday season.

Thank you,

The Page Family



©2011 Tucker Tree Farms



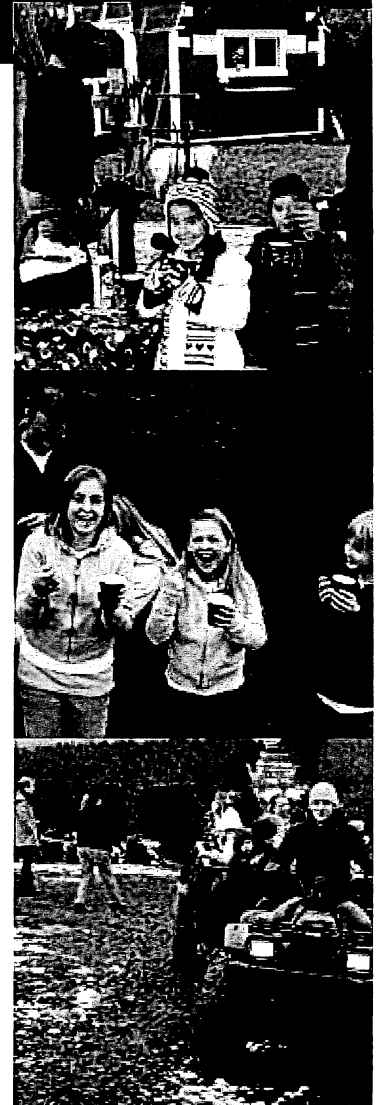
Tucker Tree Farm

S. Jory Hill Road
to O'Brien Ave.
503.931.4115

Home *Events* *Trees* *History* *Directions* *Hours*

Fun Events for Everyone!

- Growler fill and beer tasting every weekend 12-5
- Warm fires, and hot cider, cookies and candy canes.



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Tucker Tree Farm

S. Jory Hill Road
to O'Brien Ave.
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Home

Events

Trees

History

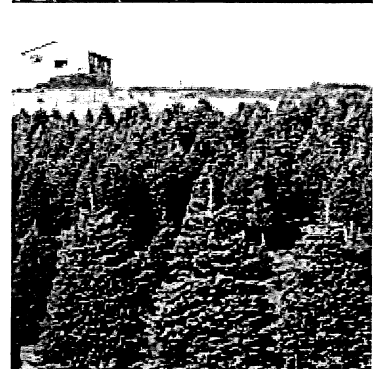
Directions

Hours

Directions to Tucker Tree Farm

- Take Liberty Rd. S
- Right on Jory Hill Rd.
- Right on O'Brien Ave.
- Tucker Tree Farm is at the end of this road

[Click Here for Google Directions](#)



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BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. P 18-011
Application of:) Clerk's File No.
MARCELLA O'BRIEN) **Partition**

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on appeal of the Planning Director's approval of the application of Marcella O'Brien, under approvals granted under ORS 197.352 (measure 37/49), to divide a 9.70-acre parcel into three parcels containing 5.7, 2.0 and 2.0 acres in an SA (Special Agriculture) zone at 6435 O'Brien Avenue S, Salem, Marion County, Oregon (T8S, R3W, 20A, tax lot 900).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and in Marion County Code (MCC), title 17 (Rural Zoning), especially chapters 17.137 and 17.172.

III. Public Hearing

A public hearing was held on this application on June 21, 2018. The Planning Division file was inventoried and made part of the record. The following persons appeared at hearing:

- | | | |
|----|----------------|--|
| 1. | Lisa Milliman | Marion County Planning Division |
| 2. | John Rasmussen | Marion County Public Works |
| 3. | Erik Steinke | Appellant representing applicant (applicant) |
| 4. | Steven Samawi | General |

No documents were entered into the record as exhibits. No objections were raised to notice, jurisdiction, conflict of interest, evidence or testimony.

IV. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The subject property is designated Special Agriculture and zoned SA. The purpose of the designation and zoning is to encourage continuation of commercial agricultural activity and regulate uses that may conflict with farming practices. The property is in a Sensitive Ground Water Overlay (SGO) Zone.

2. The subject property is on the west side of O'Brien Avenue approximately 300 feet north of its intersection with Jory Hill Road. The property contains an existing dwelling, accessory buildings, well and septic system.
3. Properties north and east are zoned SA and consist primarily of various sized farming operations. Properties to the south and west are zoned AR (Acreage Residential) and are in rural residential development.
4. Soil Survey of Marion County Area, Oregon indicates soils on the subject property are 100% high-value farm soils.
5. The property was the subject of Measure 37 case M06-97, which waived specific regulations in the Marion County Rural Zone Code. Applicant also filed a Measure 49 claim that was approved under Oregon Department of Land Conservation and Development (DLCD) ORS 195.300 to ORS 195.336 (Measure 49) Supplemental Review of Measure 37 Claim, Final Order and Home Site Authorization, State Election Number E130110 (order E130110). In section III the order concludes:

Based on the analysis above, the claimant qualifies for up to three home sites. However, the number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

Based on the documentation provided by the claimant and information from Marion County, the Measure 37 claim property includes one lot or parcel and one dwelling. There is no contiguous property under the same ownership. Therefore, the three home site approvals the claimant qualifies for under Section 6 of Measure 49 will authorize the claimant to establish up to two additional lots or parcels and two additional dwellings on the Measure 37 claim property.

6. Applicant proposes implementing order 130110 by dividing the 9.7-acre parcel into three parcels with 5.7 acres, 2.0 acres and 2.0 acres, and one homesite each.
7. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

Public Works (PW) Land Development and Engineering Permits (LDEP) Section initially commented on the application in an April 18, 2018 memorandum. On May 3, 2018, LDEP provided a revised memorandum superseding the April 18, 2018 memorandum:

PW Engineering had commented on the previous land division Application for this property under case #P07-072 in which it was determined that a public safety issue related to the access from O'Brien Avenue onto Jory Hill Road

was not resolved. The Applicants, at that time, had not demonstrated that safe access that meets county engineering standards to/from O'Brien Avenue onto Jory Hill Road can be obtained. The primary limitation is a lack of adequate intersection sight distance (ISD) due to a roadway vertical curve on Jory Hill Road. Additional county review for this case has determined that the current intersection of O'Brien Avenue and Jory Hill Road has less than half the minimum required sight distance. Due to the difficulty of achieving even a minimum ISD at this location, PW Engineering is recommending denial of this Application as a matter of traffic and public safety. However, if this proposal were to be approved, our conditions, requirements and advisories are detailed below.

ENGINEERING CONDITIONS

Public Works Engineering requests that the following conditions lettered A through C are included in the approval of the land use case.

Condition A - The Applicant shall meet all life, safety, and health-related requirements prior to any permits being issued for access, development, or increased usage to the parcels, which will include, but not necessarily be limited to, obtaining safe vehicular access in accordance with the County standards regarding adequate Intersection Sight Distance at the intersection of O'Brien Avenue and Jory Hill Road.

The foregoing standard for meeting Life, Health & Safety is not exempted by the M37/49 Waiver.

Condition B - On the partition plat, show sufficient right-of-way (R/W) to provide the public R/W half-width of 30 feet to meet the local road standard along the subject property O'Brien Avenue frontage [MCC 17.172.140 through 17.172.260].

Condition C - Prior to plat approval, under a PW Engineering Permit, widen O'Brien Avenue paved and gravel sections from Jory Hill Road to the subject property north property line to meet the Marion County Local road standard, including any necessary related drainage earthwork [MCC 11.10 & 17.172.320].

The existing road section is only roughly 12 feet wide, which is insufficient to pass two-way traffic.

ENGINEERING REQUIREMENTS

The Applicant will also have to meet the following Engineering Requirements, lettered D through I.

D. Driveways must meet sight distance, design, spacing, and safety standards [MCC 11.10]. The following numbered sub-requirements pertain to access for all parcels:

1) As stated in PW Engineering Condition A, burden of proof and implementation of corrective measures is on Applicant to demonstrate that

safe access can, and ultimately will, be achieved at the intersection of O'Brien Avenue and Jory Hill Road. This is anticipated to involve engineering survey, design, permitting and construction conducted by the Applicant and could be a significant undertaking in this case. Issuance of access permits for the parcels, and ultimately building permits, will be dependent upon ability to meet design and permit requirements.

2) Up to one (1) new direct shared access to O'Brien Avenue will be allowed to serve the two developable lots. There must be sufficient available sight distance on O'Brien Avenue as well as at the intersection of O'Brien Avenue and Jory Hill Road. It is not entirely unforeseeable given the rolling terrain that all three lots may be required to share one access having the optimum vision vantage point.

3) At the time of application of building permits, an Access Permit will be required for each buildable lot. Due to the complexity of obtaining adequate sight distance as described above, it is highly recommended that the applicant apply for, and secure, access permits well prior to even applying for building permits.

E. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits on the buildable lot [Marion County SDC Ordinances #00-10R and #98-40R].

F. O'Brien Avenue is not maintained by Marion County; it is classified as a Local Access Road, the maintenance for which is left to the resident users. Prior to plat approval, Applicant shall record a Road Maintenance Agreement declaratory statement with MCPW Engineering that will put future potential buyers of the properties on notice as to agency disposition of the roadway.

G. Any excavation work within the public right-of-way for utility work requires permits from MCPW Engineering.

H. Evidence of a DEQ NPDES 12000-C Permit is required prior to ground disturbing activities, including issuance of building permits.

I. The subject property is located in a mapped area for hi-risk erosion potential. A Marion County Erosion Prevention & Sedimentation Control (EPSC) Permit is also required to administrate local erosion control inspections.

ENGINEERING ADVISORY

The Applicant should be aware of the following advisory, lettered J:

J. A pattern of seasonal drainage tributaries to Jory Creek have their origin on the subject property. These tributaries should not be filled-in such that runoff cannot make its way through the established system.

Marion County Surveyor commented: Parcels ten acres and less must be surveyed. Per ORS 92.050, plat must be submitted for review. Checking fee, second mylar fee, and recording fee required. A current or updated title report must be submitted at the time of review. Title reports shall be no less than 15 days old at the time of approval of the plat by the Surveyor's Office, which may require additional updated reports.

Marion County Tax Office commented that 2017-18 real property taxes are paid (printout attached), a potential tax liability may exist which may need to be paid before a partition or adjustment would be approved, and per ORS 92.095, all delinquent taxes and interest as well as taxes, which have become a lien during the tax year must be paid before a partition shall be recorded.

Marion County Onsite Wastewater Group commented that site evaluations are required for all undeveloped parcels and an existing system evaluation is required for the existing residence.

Other contacted agencies had no comment or stated no objection to the proposal.

V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is a hair in applicant's favor, then the burden of proof is met and the application is approved.

2. Under MCC 17.110.680, the Planning Director shall handle matters pertaining to land divisions. MCC chapter 17.137 (SA zone) and MCC chapter 172 (subdivisions and partitions) also apply. MCC 17.172.050 also states the Planning Director has the power to decide applications for partitions. The Planning Director could decide this matter.

3. Under MCC 17.172.600, interested persons may appeal the Planning Director's final decision no later than fifteen days after the decision is rendered. The Planning Director's decision is dated May 9, 2018. Erik Steinke identified himself at hearing as the property purchaser, but did not clarify whether he would be buying the property or had already purchased the property. Either way, Mr. Steinke is an interested person who filed an appeal on May 22, 2018, within the given time limit. The appeal was timely and can be considered.
4. Under MCC 17.172.620, if the Planning Director's decision is appealed, the hearings officer shall conduct a public hearing in accordance with MCC chapter 17.111. Under MCC 17.172.640, the hearings officer shall render a decision on the appeal after the conclusion of the hearing. The hearings officer may hear and decide this matter.
5. Under MCC 17.172.510, a partition application may be filed by owners of the property subject to the application. A statutory bargain and sale deed filed in Marion County deed records at reel 3407, page 345 shows the subject property was conveyed to Marcella O'Brien, Trustee of the Marcella O'Brien Revocable Living Trust dated July 17, 2012, on July 25, 2012. Marcella O'Brien, as trustee or settlor, could file the subject application. MCC 17.172.510 is met.
6. Under MCC 17.172.520, applications must include signatures of all property owners. A statutory warranty deed filed in Marion County deed records at reel 3407, page 345 shows the subject property was conveyed to Marcella O'Brien, Trustee of the Marcella O'Brien Revocable Living Trust dated July 17, 2012, on July 25, 2018. Marcella O'Brien, trustee and settlor, signed the subject application April 3, 2018. MCC 17.172.520 was met at the time of the application. At the June 21, 2018 hearing, Erik Steinke appeared as property purchaser and spoke as appellant and applicant. It was not clear at hearing whether Mr. Steinke had already purchased the property at time of hearing or would be purchasing the property after partitioning. If Mr. Steinke has already purchased the property, the hearings officer would require Mr. Steinke and any other purchaser new owner, to sign a letter acknowledging the purchase and assuming responsibility for the application as a condition of any approval.
7. Under MCC 17.172.040, when considering a partitioning plan, the hearings officer shall consider whether it is in accord with adopted Marion County ordinances, comprehensive plans, and land development policies. Order E130110 is also considered here. In reviewing an application, the hearings officer may prescribe conditions or make changes or modifications to the partitioning plan to bring it into compliance with applicable ordinances or regulations. Applicant challenges two conditions in the Planning Director's approval, but the hearings officer must consider the whole application fresh and is not bound by the Planning Director's findings, conclusions or conditions.

8. Order E130110, section IV contains the following home site approval terms:
 1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimant is eligible for Measure 49 relief. The establishment of a land use division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate nuisance, to protect public health or safety, or to carry out federal law.

The existing dwelling and two new dwellings will all be on separate parcels made entirely from what is now tax lot 900, the property on which the claimant is eligible for Measure 49 relief. Under MCC 17.110.173, development standards mean any standards or conditions imposed in the applicable zone and in MCC title 17 and any conditions imposed as a condition of application approval. Examples of development standards are given in the variance chapter at MCC 17.122.010:

[L]ot area, lot width, percentage of lot coverage and number of dwelling units or structures permitted on a lot, height of structures, location, yards, signs, parking and loading space, vision clearance and other standards...

MCC chapter 17.137 standards are discussed in section V(27) below and are met. **In section V(13) below, the hearings officer finds MCC 17.172.320 public safety requirements are not met, and this application cannot comply with order E130110, section IV(1).**

2. This home site authorization will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).

ORS 195.305(3) reads:

Subsection (1) of this section [just compensation] shall not apply to land use regulations that were enacted prior to the claimant's acquisition date or to land use regulations:

- (a) That restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- (b) That restrict or prohibit activities for the protection of public health and safety;

(c) To the extent the land use regulation is required to comply with federal law; or

(d) That restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing.

The ORS 195.300(14) definition of land use regulation includes a provision of a county comprehensive plan, zoning ordinance or land division ordinance that restricts residential use of private real property.

ORS 195.300(21) defines protection of public health and safety as a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.

The proposed three houses on three parcels do not implicate common law public nuisances, federal law, pornography or nude dancing. Public health and safety concerns are addressed by examining land use regulations. Applicable land use regulations, including public health and safety requirements are addressed below. In section V(13), the hearings officer finds public safety requirements are not met. **Order E130110, section IV(2) is not satisfied.**

3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimant has developed the limit of twenty home sites under Measure 49, the claimant is no longer eligible for the home site approvals that are the subject of this order.

The Measure 49 claim property contains one dwelling on one parcel. The subject parcel will be divided into three parcels. The existing dwelling will be on one of the parcels and new dwellings will be on the other two parcels. This is Marcella O'Brien's only Measure 49 claim. Order E130110, section IV(3) is satisfied.

4. The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same

ownership, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this Final Order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.

Marcella O'Brien requested reconsideration of her sole measure 37 approval under this Measure 49 claim. The number of allowed dwellings is set by order E130110; three parcels of 2.0, 2.0 and 5.7 acres, with one existing dwelling on a 2.0-acre parcel, one new dwelling on the other 2.00-acre parcel, and one new dwelling on the 5.7-acre remainder parcel. Order E130110, section IV(4) is satisfied.

5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.

The subject property contains no temporary dwellings. Order E130110, section IV(5) is satisfied.

6. A home site approval only authorizes the establishment of a new lot, parcel or dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which the claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.

Order E130110 includes only tax lot 900 as the Measure 49 property. Marcella O'Brien owns no contiguous property and filed no other Measure 37/49 claims. No home sites are proposed for any land other than tax lot 900. Order E130110, section IV(6) is satisfied.

7. The claimant may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels or dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approvals the claimant qualifies for under a home site authorization, the claimant may select which existing lots,

parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.

Order E130110 authorizes three parcels and three homes sites made from the subject single unit of land. Applicant asks for three parcels and three homes sites on the unit of land. The existing dwelling will be on one of the three newly proposed units of land. Order E130110, section IV(7) is satisfied.

8. The claimant may not implement the relief described in this Measure 49 Home Site Authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.

Marcella O'Brien filed a Measure 37 claim but elected supplemental review under Measure 49. No common law vested rights decision is known, suspected or evident. Order E130110, section IV(8) is not applicable.

9. A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimant maybe required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimant is eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.

No Measure 37 dwelling is on the subject property. The subject property contains only one dwelling. This application would result in three parcels, each containing one dwelling. Order E130110, section IV(9) is satisfied.

10. Because the property is located in an exclusive farm use zone, the home site authorization does not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted

area. However, existing or remnant lots or parcels may exceed two acres.

Under ORS 215.293, the county governing body must condition approval of a single-family dwelling in a farm zone on the landowner signing and recording in the county deed records, a document binding the landowner and successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937 (right to farm laws). A condition of approval would attach to any approval requiring a farm/forest declaratory statement to be filed that satisfies ORS 215.293. The subject property is 100% high-value farmland and in a groundwater restricted area. Conditions of approval would attach to any approval requiring two parcels to be no more than 2.0 acres, and allowing the proposed 5.7-acre remainder parcel. As conditioned, order E130110, section IV(10) would be satisfied.

11. Because the property is located in an exclusive farm use zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, if an owner of the property is authorized by other home site authorizations to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.

Marcella O'Brien has no other Measure 37/49 property. All resulting parcels will be within the boundary of tax lot 900. Tax lot 900 is entirely made up of high-value farm soils. Applicant's site plan shows the existing dwelling near the south property line on two acres. The other 2.0-acre parcel is adjacent to (clustered with) the two acre parcel with the existing dwelling. The 5.7-acre remainder is a regularly shaped parcel with a house shown in its northwest corner. This leaves the farmland mostly adjacent to other farmland and away from residential uses, allowing more effective farm use of the 5.7 acre property. Order E130110, section IV(11) is satisfied.

12. If the claimant transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable

trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.

Marcella O'Brien did not transfer ownership of the property prior to the date of the August 19, 2009 order. If Ms. O'Brien later conveyed the property to Mr. Steinke, it was within ten years of the August 19, 2009 date of the Measure 47 Order. Order E130110, section IV(12) is satisfied.

13. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a *land use decision*, a permit as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties. (Emphasis added.)

Under ORS 215.402(4), permit means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. Permit does not include:

- (a) A limited land use decision as defined in ORS 197.015;
- (b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;
- (c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or
- (d) An expedited land division, as described in ORS 197.360.

The subject property may not be partitioned without a Marion County land use decision. The hearings officer has determined in sections V(13) and (28) below that land use approval cannot issue under this partitioning application. **Without this land use approval, order E13011 cannot authorize use of the subject property as proposed.**

MCC CHAPTER 17.172

9. Under MCC 17.172.200, the property line radius at street intersections shall be to Marion County Public Works department standards. The subject property does not border an intersection, but MCPW LDEP requested and the Planning Director imposed, a condition of approval requiring applicant to make intersection improvements to the Jory Hill Road-O'Brien Avenue intersection, which could involve turning radii improvements, invoking this otherwise inapplicable criterion. However, as noted in section V(13) findings below, the hearings officer is not imposing Jory Hill Road-O'Brien Avenue intersection improvements. MCC 17.172.200 is not applicable.
10. Under MCC 17.172.220, no street grade shall be in excess of 12 percent unless the commission or hearings officer finds that, because of topographic conditions, a steeper grade is necessary. The commission or hearings officer shall require a written statement from the Director of Public Works indicating approval of any street grade that exceeds 12 percent.

Under MCC 17.172.020, the general definitions section of the subdivision and partitioning chapter, street or road means a public or private way that is or has been created to provide ingress or egress for persons to one or more lots, parcels, areas, or tracts of land, excluding a private way created to provide ingress or egress for resource use only. O'Brien Avenue is an existing public roadway. The road along the property frontage is rolling but not in a geologically hazardous area that would indicate excessive slopes. No grade steeper than 12% is implicated, and any approval could be conditioned on meeting the 12% slope requirement. As conditioned, MCC 17.172.220 would be met.

11. Under MCC 17.172.240, if land to be partitioned will cause the termination of a roadway or borders a roadway right-of-way of less than standard width, the applicant shall dedicate sufficient land to provide for a cul-de-sac or to increase the half (or halves) of right-of-way bordering the subject parcel to one-half of the standard width. Unless otherwise specified for an individual street in the zoning ordinance, standard right-of-way widths are subject to Marion County Department of Public Works standards.

O'Brien Avenue currently terminates well north of the subject property and will not cause right-of-way termination. No cul-de-sac dedication is required. MCPW LDEP identifies O'Brien Avenue as a non-county maintained local access road. LDEP engineer John Rasmussen affirmed at hearing that local access road standards are those that apply to county identified local roads. The right-of-way width standard for county local roads is 60'. LDEP requested, and the Planning Director imposed, a condition requiring a 30' half-width dedication along applicants' O'Brien Avenue frontage. According to Marion County Assessor's map 083W20A, the O'Brien Avenue right-of-way along applicant's property frontage is 30'. A half-width dedication would likely require a 15' right-of-way dedication. Applicant stated agreement to the dedication at hearing. A condition of any approval can require the 30'

half-width dedication. Under MCC 17.172.160, to be effective, the dedicated property must be accepted by the Marion County Board of Commissioners and recorded with the Marion County clerk's office. As conditioned, MCC 17.172.240 would be met.

12. Under MCC 17.172.260, where topographical requirements necessitate either cuts or fills for the proper grading of streets, additional right-of-way may be required to be dedicated to allow all cut and fill slopes to be within the right-of-way. Marion County LDEP did not suggest a need for additional O'Brien Avenue half-width right-of-way dedication, beyond the 30' half-width agreed to by applicant, to accommodate cut and fill. MCC 17.172.260 does not apply.
13. Under MCC 17.172.320, all street or road improvements including pavement, curbs, sidewalks, signage, and surface drainage shall be in accordance with the specifications and standards prescribed by the Director of Public Works. *Subdivision plats shall not have final approval until such time as the director of public works, or his/her designee, is satisfied that the street improvements will be completed in accordance with the specifications and standards set forth by the Marion County department of public works.* (Emphasis added.)

No building permits within a subdivision or partition shall be issued until the director of public works, or his/her designee, approves that the improvements have been completed or sufficient improvement agreements and financial guarantees have been recorded.

The portion of this provision relating solely to subdivision plats is not applicable. The Planning Director imposed roadway improvement conditions 3(A) and (C):

Condition A - The Applicant shall meet all life, safety, and health-related requirements prior to any permits being issued for access, development, or increased usage to the parcels, which will include, but not necessarily be limited to, obtaining safe vehicular access in accordance with the County standards regarding adequate Intersection Sight Distance at the intersection of O'Brien Avenue and Jory Hill Road.

Condition C - Prior to plat approval, under a PW Engineering Permit, widen O'Brien Avenue paved and gravel sections from Jory Hill Road to the subject property north property line to meet the Marion County Local road standard, including any necessary related drainage earthwork [MCC 11.10 & 17.172.320].

Applicant protests the condition 3(A) requirement to bring the O'Brien Avenue-Jory Hill Road intersection sight distance up to Marion County standards. Applicant agrees to make the Planning Director's condition 3(C) street improvements along the subject property's O'Brien Avenue frontage, but protests the requirement to improve the frontage from the southern property boundary to Jory Hill Road.

Justification for imposing these two conditions was minimal. Public Works had commented that the meeting condition A life, health and safety standards is not exempted by M37/49 waiver, and for condition C that the existing road section is only roughly 12 feet wide, which is insufficient to pass two-way traffic.

Condition 3(A) is vague. It does not define what work would be required of applicant; it could be unlimited under the including but not limited to language of the condition. According to MCPW, site distance at the Jory Hill Road-O'Brien Avenue intersection, in both directions, is less than half of that required under PW standards, and may never be achievable. To impose a condition of approval, it must be feasible to achieve and rationally related to the criterion to be satisfied. Condition 3(A) potentially sets applicant up to spend an untold amount of money without a way to evaluate its proportionality to the proposal.

Condition 3(C) asks applicant to make roadway improvements to meet the Marion County local road standards. To do that, there must be sufficient right-of-way in which to make the improvements. Applicant has agreed to right-of-way dedication and improvements along the subject property frontage. It is difficult to conceive how applicant could make those same improvements to the street intersection without similarly dedicated right-of-way along the property to the south over which applicant has no control. Again, this appears to set applicant up for an infeasible condition or a condition with no proven proportionality to the application at hand.

O'Brien Avenue safety standards are not currently met but are also not waived under Order 13011, and applicant would potentially be adding another 20 trips per day to the roadway, not an insignificant amount of traffic given the condition of the road and site distance deficiencies. A complicating factor is O'Brien Avenue's status as a local access road. Under ORS 368.001(3), a local access road is a public road that is not a county road, state highway or federal road. Under ORS 368.031, a local access road outside a city is subject to the exercise of jurisdiction by a county governing body in the same manner as a county road except:

- (1) A county and its officers, employees or agents are not liable for failure to improve the local access road or keep it in repair.
- (2) A county governing body shall spend county money on the local access road only if it determines that the work is an emergency or if:
 - (a) The county road official recommends the expenditure;
 - (b) The public use of the road justifies the expenditure proposed; and
 - (c) The county governing body enacts an order or resolution authorizing the work and designating the work to be either a single project or a continuing program.

This state law effectively prohibits the County from expending any roadway funds to maintain or improve O'Brien Avenue, which could lead to further deteriorating condition of the road if not improved or maintained by adjacent property owners. Based on the evidence in this record, the hearings officer cannot make findings sufficient to justify imposing conditions A and C, but also cannot approve the application if public safety standards cannot be met. **MCC 17.172.320 is not met.**

14. Under MCC 17.172.400, all lots or parcels shall be served by an authorized sewage disposal system. Subsurface sewage disposal for individual parcels shall meet Department of Environmental Quality (DEQ) and Marion County Building Inspection Division requirements. Those subsurface sewage systems used by a community, sanitary district, industry, or incorporated area must be authorized by DEQ via the Marion County Building Inspection Division. Installation and maintenance shall be in accordance with DEQ regulations and requirements. The hearings officer may require connection to an existing sewage collection and treatment system regardless of lot suitability for subsurface disposal if the hearings officer deems it necessary and provided the connection is available.

Proposed parcels have no access to community sewer systems and will rely on subsurface sewage disposal. DEQ sewage disposal requirements are overseen by Marion County PW. At 2.0 and 5.7 acres, the proposed parcels are large enough to feasibly accommodate subsurface sewage disposal. PW subsurface sewage disposal permits will be made a condition of approval, including an existing system evaluation for the existing house's septic system to ensure compatibility with the new septic systems. As conditioned, MCC 17.172.400 would be met.

15. Under MCC 17.172.420, all lots or parcels shall be served by an authorized public or private water supply system or by individual private wells.

(a) Public or Private Systems: Public or private systems shall meet the requirements of the Oregon State Health Division with reference to chemical and bacteriological quality. In addition, such systems must meet the quantity, storage, and distribution system requirements of the State Health Division and the Marion County Department of Public Works.

(b) Individual Private Wells: Individual private wells must meet the construction requirements of the Oregon State Water Resources Department and be located in accordance with requirements of the State Health Division in relation to public or private sewage disposal systems. The bacteriological quality of this water may be determined through the Marion County Health Department. Upon receiving the recommendations from the State Health Division or Marion County Health Department, the Hearings Officer or Commission may require the use of an engineered public or private water system in any proposed subdivision. Other criteria to be considered in making this determination are the recommendations contained in the Marion

County Water Quality Management Plan, Marion County Comprehensive Plan, and Chapter 181 of the Marion County Rural Zoning Ordinance.

The subject property is located within an SGO zone. MCC Chapter 17.181 establishes provisions for partitioning property in an SGO zone. Applicants submitted a hydrogeology report for peer review and it was determined there are sufficient groundwater resources for the proposed new parcels. Although adequate long term water supply is, more likely than not, available, the County requires recording a Declaratory Statement with the property deed. This notifies applicant and subsequent landowners that there may be long term groundwater supply problems and that the County is not responsible for deepening or replacing wells. Wells must also be set back at least 100' from any sanitary disposal system. With conditions requiring declaratory statement recording and requiring wells to be setback 100' from any sanitary disposal system, MCC 17.172.420 would be satisfied.

16. Under MCC 17.172.430, the impact of proposed subdivisions and partitions on stormwater runoff shall be evaluated and potential adverse impacts shall be mitigated. Where evidence indicates stormwater runoff will have an adverse impact on a drainage system or natural drainage network, the developer shall demonstrate that proposed stormwater management on the subject property will compensate for the proposed change per county standards. Compliance with this requirement shall be demonstrated by compliance with department of public works engineering standards.

PW LDEP commented it will require evidence of an approved DEQ NPDES 12000-C Permit prior to ground disturbing activities, an erosion prevention and sedimentation control permit, and keeping seasonal drainage tributaries to Jory Creek that originate on the subject property available to allow runoff to make its way through the established drainage system. With these requirements, administered by MCPW, stormwater issues will be addressed during the county permitting process. MCC 17.172.430 would be satisfied.

17. Under MCC 17.172.540, unless a variance is granted, partitions shall conform to applicable regulations in MCC 17.172.460 through 17.172.660. The director shall determine if annexation to a fire, sewer or water district is required. If the director determines that annexation is required, annexation or a non-remonstrance agreement must be filed with the appropriate agency.

MCC 17.172.460 through 17.172.660 and other provisions of 17.172 specifically referring to partitioning requirements are examined in this Order. No water or sewer service districts serve this area, nor are any close by. Annexation to a water or sewer district is not feasible. No water or sewer district annexation is required. Water and septic services can feasibly be provided on-site. The subject property is in the Salem Suburban Fire District service area. A condition of any approval would require applicant to provide proof from Salem Suburban Fire District that applicant's site plan meets fire access and property identification or alternate requirements. As conditioned, MCC 17.172.540 would be met.

18. MCC 17.172.460 deals with pre-application conferences, and contains no substantive criteria.
19. MCC 17.172.480 deals with partitioning procedure and requires a partitioning application. An application was filed. MCC 17.172.480 is met.
20. MCC 17.172.500 deals with application form requirements and contains no substantive criteria.
21. MCC 17.172.510 and 17.172.520 were addressed above.
22. MCC 17.172.530 deals with governmental agency coordination. Requests for comment were sent to affected governmental agencies. MCC 172.520 procedures were followed.
23. MCC 17.172.540 deals with regulation conformance. This application is being examined against applicable regulations.
24. Under MCC 17.172.560, all lots must have a minimum of 20 feet of frontage on a public right-of-way, or, when an access easement is proposed to serve one or more lots in any partitioning, the location and improvement of the roadway access shall conform to the following standards which are necessary for adequate access for emergency vehicles. Evidence that the access has been improved to these standards shall be provided prior to the issuance of building permits on the parcels served by the access easement.
 - A. Have a minimum easement width of 20 feet;
 - B. Have a maximum grade of 12%;
 - C. Be improved with an all-weather surface with a minimum width of 12 feet;
 - D. Provide adequate sight-distance at intersections with public roadways;
 - E. Be provided with a road name sign at the public roadway as identification for emergency vehicles in accordance with the Marion County Address and Street Name Ordinance.

Sufficient roadway frontage exists for all parcels to have 20' of right-of-way frontage on O'Brien Avenue, including the proposed flag lot. If the flag lot does not have 20' of right-of-way frontage, a 20' easement would be required. MCPW is seeking access consolidation for two or all parcels depending on site distance compliance locations. Applicant does not oppose shared access for the parcels. Road naming and signage requirements can be made conditions of an approval. Because the subject property can feasibly accommodate 20' easements, the easements will likely accommodate a 12' wide all weather roadway surface. The 12% road grade standard appears feasible.

Road grade and sight distance standards appear feasible and will undergo site-specific evaluation at time of access permitting. Conditions of approval can ensure MCC 17.172.560 would be met.

25. MCC 17.172.580 through 17.172.640 deal with notification, appeal of the Planning Director's and hearings officer's decisions, hearing requirements, and contain no substantive criteria.
26. Under MCC 17.172.660, within two years of approval of the partitioning application, the applicant shall submit for approval by the Director, a partitioning plat in the appropriate form that shall reflect the final decision. When approved, the plat shall be recorded with the Marion County Clerk. Until the plat is approved and recorded, no building permits for any of the divided parcels shall issue. If applicants do not record a partitioning plat within two years, approval will be deemed null and void. One extension may be approved by the Planning Director on submission of written justification prior to the expiration of the two-year time limit. Recordation requirements can be made conditions of approval. As conditioned, MCC 17.172.660 would be met.

MCC CHAPTER 17.137

27. MCC 17.137.090 minimum parcel size and land division criteria do not apply to Measure 49 partitioning applications. But, the following MCC 17.137.100 development standards apply:
 - (A) Maximum Height:
 - (1) Dwellings - 35 feet.
 - (2) Farm related structures on farm parcels - none.
 - (3) Non-residential and non-farm structures - 35 feet unless they are in conjunction with conditional uses allowed in MCC 137.050, and a greater height is requested and approved as part of the conditional use permit.
 - (B) Minimum Setbacks. Except as required in Section 137.070(A), the following setback requirements shall be implemented for all new structures other than farm-exempt buildings, signs and fences:
 - (1) Rear Yard - A minimum of 20 feet.
 - (2) Side Yard - A minimum of 20 feet, except for lots or parcels of one-half acre or smaller created prior to January 1, 1994, in which case the side yard setback shall be five (5) feet.
 - (3) Front Yard - A minimum of 20 feet. When by ordinance a greater setback or a front yard of greater depth is required than specified in this section, then such greater setback line or front yard depth shall apply (MCC chapter 17.112, future right-of-way lines).

(C) Declaratory Statement. For all dwellings, and other uses deemed appropriate, the property owner shall be required to sign and allow the entering of the following declaratory statement into the chain of the lot(s) or parcel(s):

The property herein described is situated in or near a farm or forest zone or area in Marion County, Oregon, where the intent is to encourage, and minimize conflicts with, farm and forest use. Specifically, residents, property owners and visitors may be subject to common, customary and accepted farm or forest management practices conducted in accordance with federal and state laws that ordinarily and necessarily produce noise, dust, smoke and other impacts. The grantors, including their heirs, assigns and lessees do hereby accept the potential impacts from farm and forest practices as normal and necessary and part of the risk of establishing a dwelling, structure or use in this area, and acknowledge the need to avoid activities that conflict with nearby farm or forest uses and practices, grantors will not pursue a claim for relief or course of action alleging injury from farming or forest practice for which no action is allowed under ORS 30.936 or 30.937.

No height standard deviation is requested. Height standards can be met. At 2.0 and 5.7 acres, the proposed parcels can accommodate these setback requirements. Signing, Planning Division review, and recordation of the declaratory statement would be made a condition of any approval. As conditioned, MCC 17.137.100 would be met.

MCCP RTSP POLICY 10.3.5(23)

28. The Marion County Rural Transportation System Plan (RTSP) is an adopted part of the MCCP. RTSP policy 10.3.5(23) is written in mandatory language and applies here:

On a Local Access Road with four or more existing parcels (not counting parcels with frontage on County roadways), no new parcels shall be created that would have access to the road unless the road is improved to County standards.

The subject property is one of at least five, if not more, existing properties with access to O'Brien Avenue S and no Jory Hill Road S frontage. The proposed partitioning would add two more parcels with O'Brien access and no Jory Hill Road frontage. **MCCP RTSP policy 10.3.5(23) is not met.**

VI. Order

It is hereby found that applicants have not met the burden of proving applicable standards and criteria for approval of a partition for residential use have been met. Therefore, the partitioning application is DENIED.

VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 13 day of September 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 29 day of August, 2018.



Ann Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Marcella O'Brien
6435 O'Brien Avenue S.
Salem, OR 97306

Agencies Notified
Planning Division

(via email: gfennimore@co.marion.or.us)
(via email: breich@co.marion.or.us)
(via email: lmilliman@co.marion.or.us)

Erik Steinke
4501 Camellia Drive S.
Salem, OR 97302

Code Enforcement
Building Inspection
Assessor

(via email: bdickson@co.marion.or.us)
(via email: twheeler@co.marion.or.us)
(via email: assessor@co.marion.or.us)

Steven Samawi
P.O. Box 12946
Salem, OR 97309

PW Engineering
DLCD

(via email: jrassmussen@co.marion.or.us)
(via email: sarah.marvin@state.or.us)
(via email: timothy.murphy@state.or.us)

1000 Friends of Oregon

(via email: Meriel@friends.org)

Dorothy Hill
6540 Elmhurst Avenue S.
Salem, OR 97306

AAC Members No. 1
Aileen Kaye
10095 Parrish Gap Road SE
Turner, OR 97392

Ken Ryder
6444 O'Brien Avenue S.
Salem, OR 97306

Laurel Hines
10371 Lake Drive SE
Salem, OR 97306

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 29 day of August, 2018 and that the postage thereon was prepaid.



Susan Hogg
Secretary to Hearings Officer



Marion County
OREGON

**APPEAL OF PLANNING
DIVISION DECISION**

Marion County Planning Division
5155 Silverton Rd. NE
Salem, Oregon 97305
(503) 588-5038

Fee: \$250

| | |
|-----------------------------------|---|
| NAME(S): Erik Steinke | ADDRESS, CITY, STATE, ZIP 4501 Camellia Dr S Salem OR 97302 |
| DATE SUBMITTED: 5.22.18 | APPLICATION CASE NO: P18-011 Revised |

Do not double-side or spiral bind any documents being submitted

Notice of Appeal: Every notice of appeal should contain:

1. How the decision is factually or legally incorrect; or
2. Present new facts material to the decision; or
3. The specific reasons for the appeal.

I/we are filing this appeal because (attach additional pages if needed): Reason for appeal,
Condition C: We believe we should not be responsible for widening of O'Brien
from Jory Hill to the north side of our property. Instead, to be responsible
for the widening of the paved and gravel section of O'Brien from the South
side of our property line to the north side of our property line.
Condition A: We are appealing condition A, regarding the inadequate sight
distance at the intersection of O'Brien Ave & Jory Hill Rd. There are
7 or 8 homes off O'Brien exiting onto Jory Hill, including 6374 O'Brien Ave
(permit # 18.000366), just approved for driveway & building permits
on 1.17.18 with zero conditions. For these reasons we believe condition
A should be removed.

FOR OFFICE USE ONLY:

Appeal accepted by: BR Date: 5-22-18

Case Number: P18-11

Filing fee

File attached

Attention Property Owner: A land use proposal has been submitted for property near where you live or near property you own elsewhere. State law requires that the county notify property owners within a certain distance from this property. The proposal and address of the property is described in the "Application" section below. The decision in this case does not directly affect the zoning or use of your property. If you object to the decision, refer to the "Appeal" section. If you have questions, contact the staff person listed at the end of this report.

**NOTICE OF DECISION
PARTITION CASE NO. 18-011**

APPLICATION: Application of Marcella O'Brien, under approvals granted by ORS 197.352 (Measure 37/49), to divide a 9.70 acre parcel into three parcels containing 5.7 acres, 2.0 acres, and 2.0 acres each in a SA (Special Agriculture) zone located at 6435 O'Brien Avenue S., Salem. (T8S; R3W; Section 20A; tax lot 900). Review is subject to the criteria contained in State Final Order #E130110.

DECISION: The Planning Director for Marion County has **APPROVED** the above-described Partition application subject to certain conditions.

EXPIRATION DATE: This approval is valid only when the final partitioning plat is recorded by **May 24, 2020**. The effective period may be extended for an additional year subject to approval of an extension (form available from the Planning Division). **Additional extensions may not be granted if the regulations under which this decision was granted have changed since the original approval.**

WARNING: A decision approving the proposed division is for land use purposes only. Due to septic, well, and drainfield replacement areas, these parcels may not be able to support a dwelling. To be sure the subject property can accommodate the proposed use the applicant should contact the Building Inspection Division, (503) 588-5147.

This decision does not include approval of a building permit.

CONDITIONS: The following conditions must be met before a building permit can be obtained or the approved use established:

1. The applicant shall submit a final partition plat to the County Surveyor's Office (5155 Silverton Road NE; (503) 588-5036) and shall contain the notation that the survey is the result of Partition Case 18-009. Following plat approval it shall be recorded with the Marion County Clerk (plat instructions enclosed). **This shall be accomplished prior to issuance of any building permit(s) on the resulting parcels.**
2. The applicant is advised that a Partition Plant Service Report, from a title company, will be required upon submission of the final Mylar to the County Surveyor.
3. Public Works Land Development Engineering and Permits Division (LDEP) will not approve the final plat for recordation until the following conditions have been satisfied:

***Condition A:** The Applicant shall meet all life, safety, and health-related requirements prior to any permits being issued for access, development, or increased usage to the parcels, which will include, but not necessarily be limited to, obtaining safe vehicular access in accordance with the County standards regarding adequate Intersection Sight Distance at the intersection of O'Brien Avenue and Jory Hill Road.*

***Condition B:** On the partition plat, show sufficient right-of-way (R/W) to provide the public R/W half-width of 30 feet to meet the local road standard along the subject property O'Brien Avenue frontage [MCC 17.172.140 through 17.172.260].*

***Condition C:** Prior to plat approval, under a PW Engineering Permit, widen O'Brien Avenue paved and gravel sections from Jory Hill Road to the subject property north property line to meet the Marion County Local road standard, including any necessary related drainage earthwork [MCC 11.10 & 17.172.320].*

4. All the resulting parcels shall have at least 20 feet of frontage on O'Brien Avenue or have a 20 foot wide access easement.

5. The resulting parcels shall significantly conform to the site plan submitted with the proposal, except that Minor variations are permitted upon review and approval by the Planning Director.

Prior to issuance of building permits on the resulting parcels:

6. The partition plat shall be recorded.
7. Prior to issuance of building permits, the applicant shall provide a static water level measurement for any new wells intended as the water supply for each new lot on the enclosed form.
8. Prior to issuance of building permits, the applicant shall sign and submit a Sensitive Groundwater Overlay Zone Declaratory Statement to the Planning Division for each resulting parcel. This statement shall be recorded by the applicant with the Marion County Clerk's Office after it has been reviewed and signed by the Planning Director.

ADDITIONAL CONDITIONS: Once the approved use is established the following conditions must be continually satisfied:

9. After the final Partition plat has been recorded no alteration of property lines shall be permitted without first obtaining approval from the Planning Director.

OTHER PERMITS, FEES, AND RESTRICTIONS: This approval does not remove or affect covenants or restrictions imposed on the subject property by deed or other instrument. The proposed use may require permits and/or fees from other local, State or Federal agencies. This decision does not take the place of, or relieve the responsibility for, obtaining other permits or satisfying restrictions or conditions. It is recommended that agencies mentioned in Finding #5 be contacted to identify restrictions or necessary permits. The applicant is advised of the following:

10. Prior to recording the plat, all taxes due must be paid to the Marion County Tax Department (contact the Marion County Tax Department at (503) 588-5215 for verification of payments).
11. The applicants should contact the Salem Fire District to obtain a copy of the District's Recommended Building Access and Premise Identification regulations and the Marion County Fire Code Applications Guide. Fire District access standards may be more restrictive than County standards.

APPEAL PROCEDURE: The Marion County Zone Code provides that certain applications be considered first by the County Planning Director. If there is any doubt that the application conforms with adopted land use policies and regulations the Director must condition or deny the application. Anyone who disagrees with the decision may request that the application be considered by a Marion County hearings officer after a public hearing. The applicant may also request reconsideration (one time only and a fee of \$200.00) on the basis of new information subject to signing an extension of the 120 day time limit for review of zoning applications.

A public hearing is held on appeals subject to the appellant paying a \$250.00 fee. Requests for reconsideration, or consideration by a hearings officer, must be in writing (form available from the Planning Division) and received, together with the appeal fee, in the Marion County Planning Division, 5155 Silverton Rd NE, Salem by 5:00 p.m. on **May 24, 2018**. If you have questions about this decision contact the Planning Division at (503) 588-5038 or at the office. This decision is effective **May 25, 2018** unless further consideration is requested.

FINDINGS AND CONCLUSIONS: Findings and conclusions on which the decision was based are noted below.

1. The property is designated Special Agriculture and zoned SA (Special Agriculture). The purpose of this designation and the corresponding zone is to encourage the continuation of commercial agricultural activity and regulate uses that conflict with farming practices. The property is also located in the Sensitive Ground Water Overlay Zone (SGO), an area with limited ground water resources.
2. The property is located on the west side of O'Brien Avenue approximately 300 feet north of its intersection with Jory Hill Road. The property contains an existing dwelling, accessory buildings, well and septic system. The

property was subject of Measure 37 Case Number M06-97, which waived specific regulations in the Marion County Rural Zone Code. The applicants also filed a Measure 49 claim and were approved under State final order #E130110 for two additional lots and two additional dwellings.

The subject property is located within the Sensitive Groundwater Overlay zone. Marion County Code (MCC) Chapter 17.181 establishes provisions for partitioning property in an SGO zone. The applicants submitted a hydrogeology review for peer review and it was determined that there are sufficient groundwater resources for the additional two parcels that are proposed. Although adequate long term water supply appears to be available, the County requires a Declaratory Statement to be recorded with the property deed. This notifies the applicant and subsequent landowners that there may be long term groundwater supply problems and that the County is not responsible for deepening or replacing wells.

3. The properties to the north and east are zoned SA and consist primarily of various sized farming operations. Properties to the south and west are in the AR (Acreage Residential) zone and in rural residential development.
4. Soil Survey for Marion County, Oregon indicates soils on the subject property are 100% high-value soils.
5. Under provisions in ORS 195.300 to ORS 195.336 (Measure 49) the State of Oregon issued Final Order and Home Site Authorization E130110 for the subject property. In Section III the order concludes:

“Based on analysis above, the claimant qualifies for up to two home sites. However, the number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership.

Based on the documentation provided by the claimant, the Measure 37 claim property includes one lot or parcel and one dwelling. There is no contiguous property under the same ownership. Therefore, the two home site approvals the claimant qualifies for under Section 6 of Measure 49 will authorize the claimant to establish up to one additional lot or parcel and one dwelling on the Measure 37 claim property. Each dwelling must be on a separate lot or parcel, and must be contained within the Measure 37 claim property.”

6. The applicant proposes to implement the Measure 49 order by dividing the 9.7 acre parcel into three parcels containing 5.7 acres, 2 acres and 2 acres.
7. Public Works Land Development and Engineering Permits commented that “*PW Engineering had commented on the previous land division Application for this property under case #P07-072 in which it was determined that a public safety issue related to the access from O’Brien Avenue onto Jory Hill Road was not resolved. The Applicants, at that time, had not demonstrated that safe access that meets county engineering standards to/from O’Brien Avenue onto Jory Hill Road can be obtained. The primary limitation is a lack of adequate intersection sight distance (ISD) due to a roadway vertical curve on Jory Hill Road. Additional county review for this case has determined that the current intersection of O’Brien Avenue and Jory Hill Road has less than half the minimum required sight distance. Due to the difficulty of achieving even a minimum ISD at this location, PW Engineering is recommending denial of this Application as a matter of traffic and public safety. However, if this proposal were to be approved, our conditions, requirements and advisories are detailed below.*” LDEP also commented on requirements that are not part of the land use decision and are available for review in the Planning file. LDEP will not approve the final plat for recordation until the following conditions have been met.

Public Works Engineering requests that the following conditions lettered A through C are included in the approval of the land use case.

Condition A – *The Applicant shall meet all life, safety, and health-related requirements prior to any permits being issued for access, development, or increased usage to the parcels, which will include, but not necessarily be limited to, obtaining safe vehicular access in accordance with the County standards regarding adequate Intersection Sight Distance at the intersection of O’Brien Avenue and Jory Hill Road.*

The foregoing standard for meeting Life, Health & Safety is not exempted by the M37/49 Waiver.

Condition B – *On the partition plat, show sufficient right-of-way (R/W) to provide the public R/W half-width of 30 feet to meet the local road standard along the subject property O'Brien Avenue frontage [MCC 17.172.140 through 17.172.260].*

Condition C – *Prior to plat approval, under a PW Engineering Permit, widen O'Brien Avenue paved and gravel sections from Jory Hill Road to the subject property north property line to meet the Marion County Local road standard, including any necessary related drainage earthwork [MCC 11.10 & 17.172.320].*

The existing road section is only roughly 12 feet wide, which is insufficient to pass two-way traffic.

Marion County Surveyor commented: "Parcels ten acres and less must be surveyed. Per ORS 92.050, plat must be submitted for review. Checking fee, second mylar fee, and recording fee required. A current or updated title report must be submitted at the time of review. Title reports shall be no less than 15 days old at the time of approval of the plat by the Surveyor's Office, which may require additional updated reports."

Marion County Assessor's Office provided comments related to taxes on the subject property.

8. Under provisions in # E130110, Section IV Home Site Authorization, the claimant qualifies for two home site approvals subject to the following terms:

A. *Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimant is eligible for Measure 49 relief. The establishment of a land division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry our federal law.*

As proposed, the new dwellings will be on separate parcels. In this case, the standards for dwelling placement, partition and property line adjustments are found in Chapters 17.136 and 17.172 of the Marion County Code (MCC), including MCC 17.136.100:

- (a) *Maximum Height:*
- (1) *Dwellings - 35 feet.*
 - (2) *Farm related structures on farm parcels - none.*
 - (3) *Non-residential and non-farm structures - 35 feet unless they are in conjunction with conditional uses allowed in Section 137.050, and a greater height is requested and approved as part of the conditional use permit.*
- (b) *Minimum Setbacks: Except as required in Section 136.070(a), the following setback requirements shall be implemented for all new structures other than farm-exempt buildings, signs and fences:*
- (1) *Rear Yard - A minimum of 20 feet.*
 - (2) *Side Yard - A minimum of 20 feet, except for lots or parcels of one-half acre or smaller created prior to January 1, 1994, in which case the side yard setback shall be five (5) feet.*
 - (3) *Front Yard - A minimum of 20 feet. When by ordinance a greater setback or a front yard of greater depth is required than specified in this section, then such greater setback line or front yard depth shall apply (See Section 112).*

Based on the site plan submitted by the applicant, the proposed parcels are of adequate size and shape to meet the 20 foot setback requirements.

- (c) *Declaratory Statement. For all dwellings, and other uses deemed appropriate, the property owner shall be required to sign and allow the entering of a farm/forest declaratory statement into the chain of the lot(s) or parcel(s).*

The provision of this declaratory statement can be made a condition of any approval.

MCC 17.172.306 LOT SIZE All lots approved under this chapter shall have sufficient area to be consistent with the intent of the Comprehensive Plan and to provide adequate area for the intended structures and uses, all setbacks, access and spacing required for water supply and waste water disposal. Lots to be served by public or privately owned sewage collection and disposal system must meet the requirements and have approval of the Oregon State Department of Environmental Quality before being recorded or sold. State regulations, soil types, drainage, terrain, and location may be included as part of the criteria used by the State or county in determining appropriate lot sizes for lots using subsurface disposal of sewage. Lot size and dimension shall be as prescribed in the corresponding zone.

MCC 17.172.400 SEWAGE DISPOSAL. All lots or parcels shall be served by an authorized sewage disposal system. Subsurface sewage disposal for individual parcels shall meet the requirements of the Department of Environmental Quality (DEQ) and the Marion County Building Inspection Division. Those subsurface sewage systems that are used by a community, sanitary district, industry, or incorporated area must be authorized by the Department of Environmental Quality (DEQ) via the Marion County Building Inspection Division. Installation and maintenance shall be in accordance with the Department of Environmental Quality's regulations and requirements. The Commission, Director, or Hearings Office may require connection to an existing sewage collection and treatment system regardless of lot suitability for subsurface disposal if the Commission, Director, or Hearings Officer deems it necessary and provided the connection is available.

As noted above, the lots are of sufficient size and shape to meet setback requirements and a condition of approval will require that septic approvals be obtained prior to the plat being recorded.

MCC 17.172.420 WATER SUPPLY. All lots or parcels shall be served by an authorized public or private water supply system or individual private wells.

- (a) *Public or Private Systems: Public or private systems shall meet the requirements of the Oregon State Health Division with reference to chemical and bacteriological quality. In addition, such systems must meet the quantity, storage, and distribution system requirements of the State Health Division and the Marion County Department of Public Works.*
- (b) *Individual Private Wells: Individual private wells must meet the construction requirements of the Oregon State Water Resources Department and be located in accordance with requirements of the State Health Division in relation to public or private sewage disposal systems. The bacteriological quality of this water may be determined through the Marion County Health Department. Upon receiving the recommendations from the State Health Division or Marion County Health Department, the Hearings Officer or Commission may require the use of an engineered public or private water system in any proposed subdivision. Other criteria to be considered in making this determination are the recommendations contained in the Marion County Water Quality Management Plan, Marion County Comprehensive Plan, and Chapter 181 of the Marion County Rural Zoning Ordinance.*

Water will be provided by a private well. The property is located in a SGO (Sensitive Groundwater Overlay) zone and the standards in Chapter 181 have been met. The applicant will be required to record declaratory statements for each lot that provides notice that the property is in an area with limited groundwater resources.

MCC 17.172.560 ACCESS STANDARDS All lots must have a minimum of 20 feet of frontage on a public right-of-way, or, when an access easement is proposed to serve one or more lots in any partitioning, the location and improvement of the roadway access shall conform to the following standards which are necessary for adequate access for emergency vehicles. Evidence that the access has been improved to these standards shall be provided prior to the issuance of building permits on the parcels served by the access easement.

- (a) *Have a minimum easement width of 20 feet;*

- (b) *Have a maximum grade of 12%;*
- (c) *Be improved with an all-weather surface with a minimum width of 12 feet;*
- (d) *Provide adequate sight-distance at intersections with public roadways;*
- (e) *Be provided with a road name sign at the public roadway as an identification for emergency vehicles in accordance with the Marion County Address and Street Name Ordinance.*

Marion County Public Works LDEP has determined that the current intersection of O'Brien Avenue and Jory Hill Road has less than half the minimum required sight distance. Due to the difficulty of achieving even a minimum ISD at this location, PW Engineering is recommending denial of this Application as a matter of traffic and public safety. However, conditions of approval were suggested to mitigate the safety concerns that have been included in this decision as conditions of approval.

The applicants are proposing to configure the parcels so that each has frontage on O'Brien Avenue and each will be served by a separate driveway. The site plan submitted with the application indicates a flag lot is proposed with frontage on a public road of 14 feet in width. In order to meet the minimum frontage standards, the flag lot will be required to have at least 20 feet of frontage on O'Brien Avenue. As an alternative, the lot without adequate frontage on a public road may be served by a 20 foot wide easement over the adjacent lot. The requirements in MCC 17.172.560 can be made a condition of any approval.

- B. *This home site authorization will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).*

This proposal creates two additional parcels and permits a new dwelling on each of the undeveloped parcels and does not violate ORS 195.305(3) or any other local, state, or federal law. This term is met.

- C. *The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lot, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If lots, parcels or dwellings currently exist on the Measure 37 claim property or on contiguous property under the same ownership and the lots, parcels or dwellings have not been disclosed to the department, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be reduced according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.*

Under # E130110 the claimant is entitled to three home sites. The Measure 37 claim property contains one dwelling and one parcel. Under the proposal the existing parcel will be partitioned into three parcels. The existing dwelling will remain on one of the resulting 2-acre parcels and a new dwelling will be placed on each of the other parcels, and does not violate ORS 195.305(3) or any other local, state, or federal law. This term is met.

- D. *Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.*

The property contains no temporary dwellings; this term is satisfied

- E. *A home site approval only authorizes the establishment of a new lot, parcel or dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which the claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.*

The proposed parcels and home sites are entirely on property authorized by the claim, and the applicants own no contiguous lots or parcels. This term is satisfied.

- F. *The claimant may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels, or dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approvals the claimant qualifies for under a home site authorization, the claimant may select which existing lots, parcels, or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.*

The claim authorizes a total of three home sites and the proposal by the claimant will result in one existing and two new home sites. This term is met.

- G. *A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimant may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimants are eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.*

The proposal will result in a total of three lots with only one dwelling on each, this term is satisfied.

- H. *If the claimant transferred his ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.*

The property ownership has not been transferred since E130110 was issued. This term is met.

- I. *Because the property is located in an exclusive farm use zone, the home site authorization does not authorize new lots or parcels that exceed five acres. However, existing lots or parcels may exceed five acres. Before beginning construction, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing lots or parcels may exceed two acres.*

The property is composed entirely of high-value farm soils and the new parcels will not exceed two acres. As noted above, a condition of approval will be attached requiring the filing of a farm/forest declaratory statement that satisfies ORS 215.293. This term is satisfied.

- J. *Because the property is located in an exclusive farm use zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, if an owner of the property is authorized by other home site authorizations to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lot, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.*

The proposal is to cluster the new 2-acre parcels on the west side of the parcel where the existing dwelling is located. The proposed location and clustering appears to have the least impact on farming on the subject property and in the area. This term is met.

K. *To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties.*

There are no public or private easements, conditions or restrictions applying to the subject property that would prohibit or otherwise restrict this proposal. Conditions of approval will require the property owner to obtain all necessary permits and approvals prior to implementing this order. This term is satisfied.

9. Based on the above findings and conclusions, the applicant's proposal meets the terms in Final Order and Home Site Authorization E130110 approved under provisions in ORS 195.300 to ORS 195.336 (Measure 49) for the subject property. The partitioning request is, therefore, **APPROVED** subject to conditions.

Joe Fennimore
Director-Planning Division

Date: May 9, 2018

If you have any questions please contact Lisa Milliman at (503) 588-5038.

Notice to Mortgagee, Lienholder, Vendor or Seller: ORS Chapter 215 requires that if you receive this Notice, it must promptly be forwarded to the purchaser.