



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

July 30, 2008



TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director  
Carmel Bender, Measure 49 Communication & Compliance Coordinator

SUBJECT: **Agenda Item 4b, August 6-7, 2008, LCDC Meeting**

### REVIEW OF A DIRECTOR'S DECISION TO APPEAL TO THE LAND USE BOARD OF APPEALS (LUBA)

#### YAMHILL COUNTY

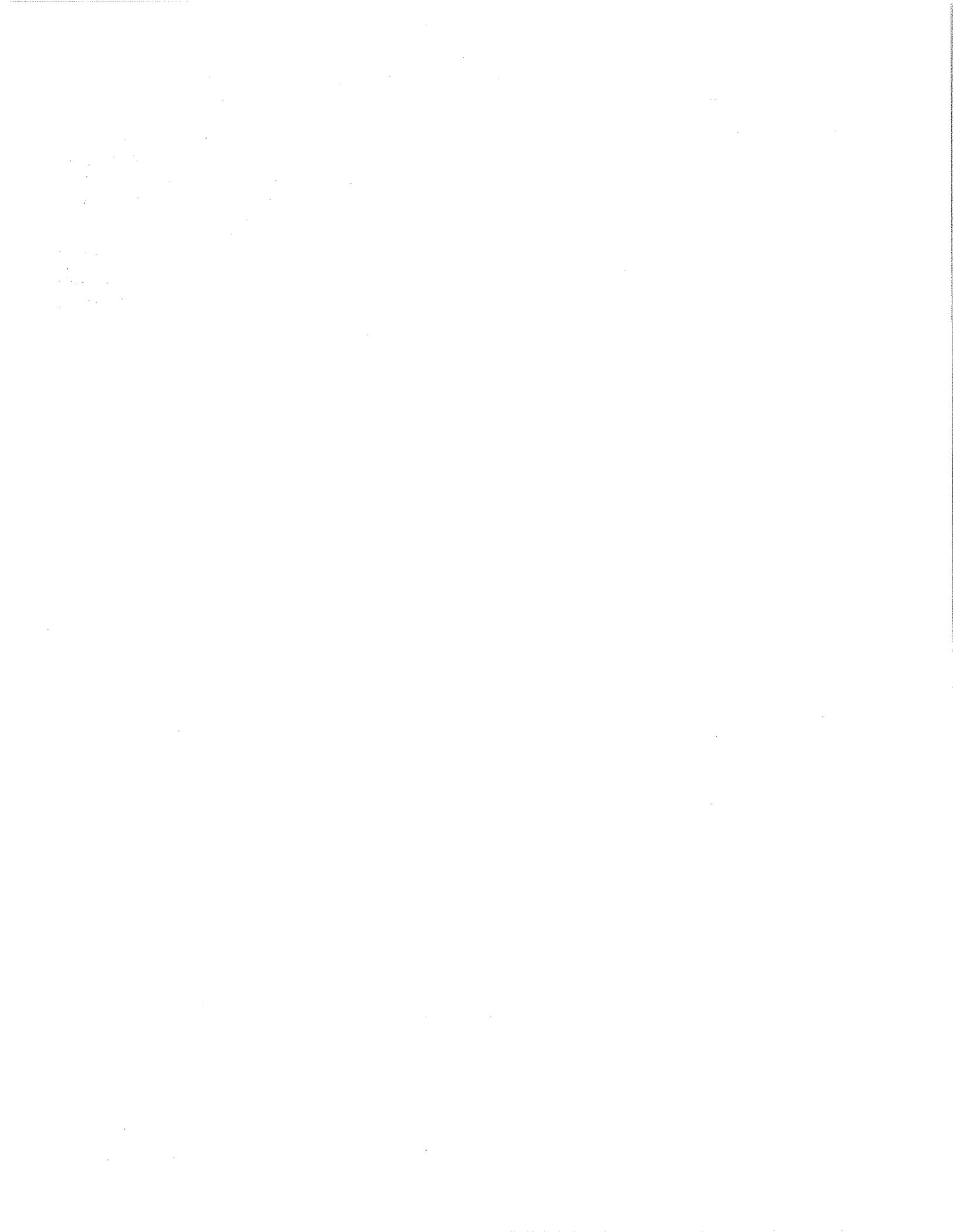
#### I. RECOMMENDATION

The director recommends, based on the information contained in this report, that the Commission authorize the Department of Land Conservation and Development (department) to proceed with the appeal of a Yamhill County decision to the Land Use Board of Appeals (LUBA). A Notice of Intent to Appeal was filed with LUBA (LUBA No. 2008-130) on July 29, 2008. The 21-day period for filing an appeal concluded on July 30, 2008.

#### II. CASE SUMMARY

John and Elisabeth Kroo received county and state waivers under Measure 37 (state claim M122329) allowing them to divide the 31-acre property into 2.5-acre parcels and to develop dwellings on each resulting vacant parcel, to the extent that use was allowed at the time they acquired the property in 1965. The claimants applied to the county for preliminary plat approval of a 12-lot subdivision. The application was ultimately modified to a 10-lot subdivision and approved by the Yamhill County Board of Commissioners (Board) on May 23, 2007.

Neighbors appealed the county's decision to LUBA (*Welch v. Yamhill County*, LUBA No. 2007-111, February 20, 2008). While the appeal was pending, Measure 49 was enacted by the voters, and implemented on December 6, 2007. LUBA issued its opinion on February 20, 2008, remanding the decision to the county for further findings.



After receiving notice that the county had scheduled a de novo hearing to consider the remand, the department submitted written comments to the county explaining that due to Measure 49, the Measure 37 waivers that had been the basis of the original approval were now expired. Since certain land use regulations were no longer waived for the applicants, the current approval criteria would need to be applied when making the decision on remand.

The county held hearings on June 11 and 18 to consider the remand issues, but did not apply the current regulations or make alternate findings as to the impact of Measure 49 on the application. On July 9, 2008, the Board again approved the application.

The department timely appealed this decision to LUBA as described above.

Pursuant to Commission rules (OAR 660-001-0220), the department notified the property owner and Yamhill County of its intent to appeal the county's decision. In the notice, the department indicated that an opportunity exists to appear before the commission to discuss the merits of the department's appeal. Parties were also informed about the factors in OAR 660-001-0230(3) upon which the commission will base its decision on whether or not to direct the department to proceed with this appeal.

### **III. APPEAL FACTORS**

To proceed with an appeal, the commission must base its decision on one or more of the following factors from OAR 660-001-0230(3):

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objectives of the agency's Strategic Plan;
- (f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.

### **IV. ANALYSIS**

#### **(a) Whether the Case Requires Interpretation of a Statewide Planning Goal, Statute, or Rule**

This case involves interpretation of Measure 49, ORS 195.305 et seq and specifically the application of Measure 49 to land use decisions initially determined prior to enactment of Measure 49 based on then-existing Measure 37 waivers, but remanded to the county from LUBA after enactment of Measure 49.



LCDC explained the application of Measure 49 to Measure 37 waivers in OAR 660-041-0060, which provides:

Any authorization for a Claimant to use Measure 37 Claim Property without application of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on December 6, 2007, as did the effect of any order of DLCD denying a Claim. A Claimant may continue an existing use of Measure 37 Claim Property that was authorized under ORS 197.352 (2005). A Claimant may complete a use of Measure 37 Claim Property that was begun prior to December 6, 2007, only if the Claimant had a common law vested right to complete and continue that use on December 6, 2007, and the use complies with the terms of any applicable DLCD Measure 37 Waiver.

Without waivers of certain existing land use regulations provided under Measure 37, the county's decision violates state laws that apply to the owners' use of the property. Based on a preliminary review of the underlying subdivision application, it appears that Goals 3 and 4, and the implementing statutes and rules that restrict subdivision and development in Farm/Forest zones apply to the proposed use of the property.

**(b) Whether a Ruling in the Case will Serve to Clarify State Planning Law**

A ruling in this case will further clarify that under Measure 49 counties may not issue permits pursuant to Measure 37 waivers after December 6, 2007.

**(c) Whether the Case has Important Enforcement Value**

This case has important enforcement value, as it will ensure that state Goals, statutes and regulations are enforced by counties for land use applications that were originally based on Measure 37 waivers that are now expired.

**(d) Whether the Case Concerns a Significant Natural, Cultural or Economic Resource**

The property involved is designated farm/forest resource land under Goals 3 and 4.

**(e) Whether the Case Advances the Objectives of the Agency's Strategic Plan**

Not Applicable.

**(f) Whether there is a Better Way to Accomplish the Objective of the Appeal, such as Dispute Resolution, Enforcement Proceedings or Technical Assistance**

The department did seek to resolve the matter with the county by advising it of the state's position on the impact of Measure 49 on the viability of Measure 37 waivers in its written comments dated June 3, 2008. The county's decision is final unless appealed to LUBA, so this action is the only option available for enforcing the applicable rules.

**V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION**



The Department recommends that the Commission support the Director's recommendation and proceed with an appeal of the Yamhill County land use decision.

**Proposed Motion:** I move that the Commission approve a department appeal of the subject decision from Yamhill County to the Land Use Board of Appeals because the information included in this report demonstrates that OAR 660-001-0230(3) (a), (b), (c) and (d) apply.

**Alternative motion:** I move the Commission not approve an appeal of the subject decision from Yamhill County because \_\_\_\_\_.

Attachments: *Welch v. Yamhill County*, LUBA No. 2007-111 (February 20, 2008)  
Yamhill County Notice of Public Hearing  
DLCD Comment Letter, June 3, 2008  
Yamhill County Board Order 08-480, July 9, 2008  
Notice of Intent to Appeal, July 29, 2008



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

KAROL SUSAN WELCH, BEVERLY DAVIS  
and MICHELLE MICKELSON,  
*Petitioners,*

vs.

YAMHILL COUNTY,  
*Respondent,*

and

JOHN KROO,  
*Intervenor-Respondent.*

LUBA No. 2007-111

FINAL OPINION  
AND ORDER

Appeal from Yamhill County.

Anne C. Davies, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Yamhill County.

Samuel R. Justice, McMinnville, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Haugeberg Rueter Gowell Fredricks Higgins & McKeegan PC.

RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED

02/20/2008

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the county approving a 10-lot subdivision pursuant to  
4 Ballot Measure 37 waivers.

5 **FACTS**

6 The subject property is a 31.03 acre parcel zoned Agriculture/Forestry Large Holding  
7 (AF-20). In September, 2005, intervenor filed a claim with the Oregon Department of Land  
8 Conservation and Development (DLCD) seeking compensation under ORS 197.352(1)  
9 (2005) (Ballot Measure 37) in the amount of \$1,925,000 for the reduction in the fair market  
10 value of the property as a result of land use regulations that intervenor alleged restricted the  
11 use of the property. Record 45. In lieu of paying compensation, DLCD issued a final order  
12 authorizing intervenor (and his wife) to subdivide the property into 2.5 acre parcels and site a  
13 dwelling on each parcel. Record 39-48.

14 Intervenor also filed a claim with the county, and the county approved the claim in  
15 Board Order 06-153 (County Order). The County Order is not in the record in this appeal,  
16 but a portion of it is referenced in the decision and a staff report. Record 5-6, 359.

17 In August, 2006, intervenor applied to subdivide the property into 12 lots ranging  
18 from 2.1 to 3.2 acres in size. Record 425. The planning commission approved the  
19 subdivision application, and some of the petitioners appealed. Intervenor subsequently  
20 reduced the proposed number of lots to 10. Record 104. On May 23, 2007, the board of  
21 commissioners approved a 10-lot subdivision.<sup>1</sup> This appeal followed.

---

<sup>1</sup> In November 2007, the voters adopted Ballot Measure 49, a measure referred to the voters by the legislature that comprehensively amended ORS 197.352, and for all practical purposes replaced it with a different system for treating claims for compensation, codified at ORS 195.300 et seq. See *Frank v. DLCD*, 217 Or App 498, 503, \_\_ P3d \_\_ (2008) (discussing the new system for treating claims for compensation under ORS 197.352(2005)). Ballot Measure 49 became effective on December 6, 2007.

1    **FIRST ASSIGNMENT OF ERROR**

2           In their first assignment of error, petitioners argue that the county erred in approving  
3    a 10-lot subdivision because intervenor’s original application sought approval of a 12-lot  
4    subdivision. As explained above, intervenor originally applied for approval of a 12-lot  
5    subdivision, and the planning commission approved a 12-lot subdivision. After petitioners  
6    appealed the planning commission’s decision, intervenor subsequently reduced the number  
7    of proposed subdivision lots to 10 lots. Record 104.

8           **A.     Fourth Subassignment of Error**

9           In their fourth subassignment of error, petitioners argue that the decision is not  
10   supported by substantial evidence because the record does not include a plat depicting the  
11   10-lot subdivision. Intervenor first responds by explaining that a map located at Record 215  
12   identifies the location of the new lot lines, and the submission of a revised plat was  
13   referenced in other documents submitted into the record. Record 99-104. Intervenor also  
14   notes, correctly, that at least one petitioner commented on the map located at Record 215.  
15   Record 28 (letter from petitioner Welch referring to a map entitled “Figure 3, Proposed  
16   Developed Conditions”). Therefore, intervenor argues, petitioners were provided an  
17   opportunity to comment on the revised plat.

18           Record 215 is a map entitled “Proposed Developed Conditions” and appears to be a  
19   map showing the location of drainage systems for the subdivision. The new property lines  
20   and lot numbers are visible on that drainage map.<sup>2</sup> However, Yamhill County Land  
21   Development Ordinance (LDO) 5.010 specifies the requirements for a preliminary plat, and  
22   includes, in particular, a requirement that the plat show “[a]ppropriate identification of the

---

In the petition for review, petitioners generally assert that the amendments to ORS 197.352(2005) render the present appeal moot. However, petitioners do not develop an argument regarding that issue that is sufficient for us to review, and we therefore do not consider the issue.

<sup>2</sup> Record 419 is the original “tentative subdivision map” submitted by intervenor showing the 12-lot proposal.

1 drawing as a preliminary plat” as well as a requirement that “[t]he location of all existing and  
2 proposed structures on the area to be subdivided that are to be created or remain in place.”  
3 LDO 5.010(E) and (M). The drainage map located at Record 215 is not identified as a  
4 preliminary plat, and does not show the location of existing and proposed structures.  
5 Therefore, to the extent intervenor argues that the map at Record 215 is a revised preliminary  
6 plat, we disagree with intervenor. In addition, the fact that one of the petitioners commented  
7 on the map at Record 215 does not indicate that, absent its identification as a revised  
8 preliminary plat, that petitioner was aware that a revised plat had been submitted.

9 This subassignment of error is sustained.

10 **B. First Subassignment of Error**

11 In their first subassignment of error, petitioners argue that the change from a  
12 proposed 12-lot subdivision to a proposed 10-lot subdivision required the submittal of a new  
13 application. Petitioners argue that the new proposed configuration “\* \* \* required a  
14 completely new and different analysis of the applicable criteria.” Petition for Review 9. For  
15 example, petitioners argue, the change to a 10-lot subdivision appeared to change the  
16 proposal from a community water system to individual wells. However, petitioners do not  
17 specify how the criteria should have been analyzed differently after the proposal was  
18 changed to a 10-lot subdivision. The mere fact that a plat or an application is modified does  
19 not automatically require a new application to be filed. *Friends of the Metolius v. Jefferson*  
20 *County*, 48 Or LUBA 466, 486 (2005); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*,  
21 *25 Or LUBA 601, 606-607 (1993)* (a new application is not required if the original proposal  
22 remains “fundamentally intact”). Petitioners have not explained how the change to a 10-lot  
23 subdivision caused the application to fail to remain “fundamentally intact.” As such,  
24 petitioners have not provided a basis for reversal or remand of the decision.

25 This subassignment of error is denied.

1           **C.     Second Subassignment of Error**

2           In their second subassignment of error, petitioners argue that the county erred in  
3 failing to provide notice of the revised proposal for a 10-lot subdivision and in failing to give  
4 petitioners an opportunity to comment on the revised plat. In support of their subassignment  
5 of error, petitioners cite ORS 197.830(5).<sup>3</sup> That statute provides for additional appeal rights  
6 to parties where a local government makes a decision that is different from the proposal  
7 described in the notice. That statute does not require notice of a change to an application.  
8 As such, petitioners' subassignment of error provides no basis for reversal or remand.

9           This subassignment of error is denied.

10           **D.     Third Subassignment of Error**

11           In their third subassignment of error, petitioners argue that the county committed a  
12 procedural error in approving the 10-lot subdivision without prior action by the planning  
13 commission. According to petitioners, LDO 16.000 limits the authority of board of  
14 commissioners to reviewing the planning commission's (or hearings officer's) decision and,  
15 consequently, the board of commissioners did not have the authority to approve intervenor's  
16 modified request for a 10-lot subdivision. In support of their argument, petitioners cite  
17 LDO 16.000(5) and (6).<sup>4</sup> The provisions cited by petitioners allow the board of

---

<sup>3</sup> ORS 197.830(5) provides:

"If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

"(a) Within 21 days of actual notice where notice is required; or

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

<sup>4</sup> LDO 16.000 provides the framework for appeals of planning director, hearings officer, or planning commission decisions, and provides in relevant part:

1 commissioners to choose to hear an application “*de novo*,” and to allow the admission of  
2 additional testimony without holding a *de novo* hearing. Significantly, LDO 16.000(7) gives  
3 the board of commissioners the authority to “\* \* \* *modify*, reverse, or affirm” all or part of  
4 the decision below. We disagree with petitioners that LDO 16.000 prohibits the board of  
5 commissioners from approving intervenor’s modified application, simply because that  
6 application was different from the one approved by the planning commission. LDO  
7 16.000(7) gives the board authority to approve a modified application.

8 This subassignment of error is denied.

9 The first assignment of error is sustained, in part.

## 10 **SECOND ASSIGNMENT OF ERROR**

11 In their second assignment of error, petitioners argue that because the county’s  
12 Measure 37 order is not included in the record, the county failed to make a decision based on

---

“5. The Board upon its own motion or upon the motion by a party may elect to hear the application *de novo* or allow testimony and other evidence in addition to that already on the record.

“6. The Board may admit additional testimony and other evidence without holding a *de novo* hearing if it is satisfied that the testimony or other evidence could not have been presented upon initial hearing and action. In deciding such admission, the Board shall make findings addressing the following:

“A. Prejudice to parties;

“B. Convenience of locating the evidence at the time of initial hearing;

“C. Surprise to opposing parties;

“D. Time when notice was given to other parties of a party’s intent to give additional testimony or introduce additional evidence.

“E. The competency, relevancy and materiality of the proposed testimony or other evidence.

“7. In hearing and deciding an appeal, the Board may modify, reverse or affirm all or part of the order, requirements, decision, or determination of the reviewing body, or may remand the matter back to the reviewing body for additional information. In all cases the Board shall make findings based on the record before it and any testimony or other evidence received by it as justification for its action.”

1 the applicable criteria and that the decision is not supported by substantial evidence.  
2 Intervenor responds by requesting that LUBA take official notice of the County Order, and  
3 attaches a copy of the order to his brief. The County Order determines which county laws do  
4 or do not apply to the disputed subdivision and, in our view, therefore constitutes applicable  
5 law subject to official notice. We agree with intervenor that we may take official notice of  
6 the County Order under ORS 40.090(7), and we do so.<sup>5</sup>

7 Further, even if the record does not include the County Order, the decision and a staff  
8 report presented to the board of commissioners summarize the portion of the County Order  
9 that describes what the County Order approved.<sup>6</sup> Petitioners do not identify any applicable  
10 criteria set forth in the County Order that the county failed to consider. The county identified  
11 the relevant approval criteria for the application and addressed those criteria in its decision.  
12 Record 7-10. Petitioners have not explained why the absence of the County Order in the  
13 record constitutes error.

14 The second assignment of error is denied.

---

<sup>5</sup> ORS 40.090 (Oregon Evidence Code 202) provides in relevant part:

“Law judicially noticed is defined as:

“ \* \* \* \* \*

“(7) An ordinance, comprehensive plan or enactment of any county or incorporated city  
in this state, or a right derived therefrom.\* \* \*”

<sup>6</sup> The county’s decision explains:

“[Intervenor] \* \* \* filed an application under Measure 37 (2004) to remove, modify, or not  
apply the land use regulations in effect when [intervenor] first acquired the property. In [the]  
claim he requested:

“All uses allowed owner as time of owner’s acquisition of property. Specifically,  
but not limited to, the ability to create buildable parcels averaging two and one-half  
acres in size, more or less, as owner sees fit...”

“Their claim was approved as detailed in Board Order 06-153. The Board Order allowed  
land division and dwelling approvals under the land use regulations in effect on February 20,  
1965.” Record 5.

1     **THIRD ASSIGNMENT OF ERROR**

2             In their third assignment of error, petitioners argue that the county erred in approving  
3 the application because the recipients of the DLCD Order waiving land use regulations are  
4 John and Elizabeth Kroo, individually, but the named applicant for subdivision approval is  
5 the “Kroo Family Living Trust.”<sup>7</sup> According to petitioners, “the applicant for a post-  
6 Measure 37 land use application must be the person or persons who have a valid Measure 37  
7 waiver.” Petition for Review 16.

8             LDO 4.010 requires the “owner,” as defined in LDO 3.010, to apply for subdivision  
9 approval on the form prescribed by the county.<sup>8</sup> The county’s application form contains a  
10 section for information on the “applicant” as well as a section for information on the “legal  
11 owner (if different) [from the applicant].” Record 425. Thus it appears that the county allows  
12 parties to act as agents for an owner, and submit an application on the owner’s behalf. We  
13 understand petitioners to argue that because the application submitted by intervenor  
14 identifies the “Kroo Family Living Trust” as the “applicant,” the county could not approve  
15 the subdivision application based on the Measure 37 waiver that was issued to John Kroo, as  
16 set forth in the DLCD Order.

17             We think it is clear from the record that John Kroo, a holder of a valid Measure 37  
18 claim under the DLCD Order, is the person who sought approval for the subdivision. John  
19 Kroo appeared throughout during the proceedings below. There is nothing in the LDO or

---

<sup>7</sup> As explained in the DLCD Order, John and Elizabeth Kroo submitted a claim for compensation under ORS 197.352(1). The DLCD Order acknowledges that the Kroos transferred the subject property to their revocable living trust in 2003, and concludes that their transfer to a revocable trust was not a change in ownership for purposes of Measure 37. Record 44.

<sup>8</sup> LDO 3.010(38) defines “owner” as:

“All persons having right, title or interest in a parcel. For the purpose of this ordinance, owner shall also refer to the owner’s authorized agent except when the owner’s signature is required.”

1 any other law cited by petitioners that prohibits a properly authorized agent for John Kroo, in  
2 this case the “Kroo Family Living Trust,” from submitting the application on behalf of John  
3 Kroo.

4 Petitioners also argue that the county erred in determining that John and Elizabeth  
5 Kroo are the trustees of the Kroo Family Living Trust because the trust document is not in  
6 the record. Because we have determined that nothing prohibited the Kroo Family Living  
7 Trust from acting as the agent for John and Elizabeth Kroo, the holders of the valid Measure  
8 37 claim, we need not determine whether the record supports the county’s conclusion that  
9 John Kroo and Elizabeth Kroo are the trustees of the Kroo Family Living Trust.

10 The DLCD Order determines that the Kroos are the owners of the subject property for  
11 purposes of ORS 197.352, and that the 2003 transfer of legal title to the property to a  
12 revocable trust was not a change in ownership for purposes of that statute. Petitioners argue  
13 that DLCD erred in determining that the Kroos are the current owners of the property, for  
14 purposes of ORS 197.352. Under ORS 197.352(9), we do not have jurisdiction to review  
15 petitioners’ challenge to the DLCD Order. *See n 12, infra. Friends of Linn County v. Linn*  
16 *County*, 54 Or LUBA 191, 203 (2007).

17 The third assignment of error is denied.

18 **FOURTH ASSIGNMENT OF ERROR**

19 Petitioners withdrew their fourth assignment of error at oral argument.

20 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

21 **A. The County Order**

22 The County Order that determined to “not \* \* \* apply” land use regulations under  
23 ORS 197.352(8) provided in relevant part:

24 “In lieu of payment of just compensation, the Yamhill County land use  
25 regulations identified in Exhibit ‘A’ are modified, removed, or not applied  
26 against the subject property with the following effect: \* \* \*” Response Brief  
27 App. 12.

1 Exhibit A attached to the County Order is a staff report prepared by the planning director in  
2 connection with intervenor's Measure 37 claim. Exhibit A contains the following  
3 recommendation:

4        "\* \* \* the Planning Director recommends that the Board of Commissioners  
5        modify remove or not apply land use regulations listed in Section (B)(1) [of  
6        the staff report] against the subject property when the current owner seeks  
7        development permits on the subject property." Response Brief App. 18.

8 Section (B)(1) lists the following land use regulations:

9        "a. Ordinance 29, Yamhill County Zoning Ordinance, adopted August 30,  
10        1968.

11        "b. Ordinance 62, Yamhill County Comprehensive Plan, adopted 1974.

12        "c. Ordinance 83, adopted February 11, 1976.

13        "d. Ordinance 205, as amended, adopted June, 1979.

14        "e. Ordinance 310, as amended, adopted December 1, 1982."<sup>9</sup> Response  
15        Brief App. 16.

16 The staff report also contains the following statement:

17        "The challenged land use regulations do not constitute an 'exempt land use  
18        regulation' as defined in Section 1(3) of Ordinance 749."<sup>10</sup> Response Brief  
19        App. 16.

20 The County Order was not challenged in circuit court.

---

<sup>9</sup> The county's first subdivision ordinance, the predecessor of the current LDO, was adopted by Ordinance 205.

<sup>10</sup> Ordinance 749 is the county's "Measure 37" Ordinance. Section 1(3) defines "exempt land use regulation" in relevant part as:

"(3) Exempt Land Use Regulation. A land use regulation that:

"\* \* \* \* \*

"(b) Restricts or prohibits activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations[.]"

1 Notwithstanding the County Order, however, in its decision approving the  
2 subdivision, the county found that various parts of its land use regulations are “health and  
3 safety regulations” that applied to intervenor’s proposed subdivision. The county found:

4 “The applicant has applied using the present subdivision standards. The  
5 planning staff noted that many of the standards would not be applied when the  
6 owner first acquired the property. Notably, the measure does not allow the  
7 local jurisdiction to remove, modify, or not apply regulations related to public  
8 health and safety, Section 1.3(b) of Ordinance 749 defines exempt land use  
9 regulation as a regulation that:

10 “(b) Restricts or prohibits activities for the protection of public health and  
11 safety, such as fire and building codes, health and sanitation  
12 regulations, solid or hazardous waste regulations, and pollution control  
13 regulations.”

14 “Therefore, health and safety regulations, like the requirement to have the soil  
15 evaluated for the safe installation of a sewage disposal system, will need to be  
16 complied with in evaluating this land division. Standards unrelated to health  
17 and safety issues will not be required.\* \* \*” Record 6.

18 In making such a finding, the county appears to have determined that the County Order  
19 deferred determination of whether particular parts of the county land use regulations that  
20 were waived by the County Order are exempt “health and safety regulations,” that is,  
21 regulations that continued to apply to the property and to the decision on the subdivision  
22 application. The above findings seem to us to be inconsistent with the County Order which  
23 appears to both waive the county’s subdivision and zoning regulations in their entirety and  
24 find that they are not “exempt land use regulations” under Ordinance 749. The above  
25 findings then proceed to say the county will nevertheless apply LDO standards that  
26 presumably were waived by the County Order. The only legal theory the county suggests for  
27 proceeding in that manner is that the applicant is seeking approval under present subdivision  
28 standards.

29 During the proceedings below, and in the response brief, intervenor agreed that  
30 exempt health and safety regulations continued to apply to intervenor’s proposed subdivision  
31 of the property. Record 101, 309, 339; Response Brief 24-25. Intervenor does not challenge

1 or otherwise assign error to the county's finding that, notwithstanding the terms of the  
2 County Order, certain LDO and Yamhill County Zoning Ordinance (YCZO) sections were  
3 not waived by the County Order. Because no party assigns error to that finding, we do not  
4 consider that finding further. Therefore, for purposes of this appeal, no issue is presented  
5 regarding whether the county erred by determining that it would in the subdivision approval  
6 proceeding determine whether particular disputed sections of the LDO and the YCZO must  
7 be applied because they are "health and safety" land use regulations under ORS  
8 197.352(3)(2005).

9 **B. Fifth Assignment of Error**

10 In their fifth assignment of error, petitioners argue that the county's findings  
11 regarding LDO 6.020 are inadequate and are not supported by substantial evidence. LDO  
12 6.020 requires in relevant part that "each anticipated homesite shall be capable of being  
13 provided access that meets minimum requirements for access by fire protection  
14 equipment."<sup>11</sup> Although petitioners apparently raised an issue below regarding the  
15 subdivision's compliance with LDO 6.020, the decision does not mention or address LDO  
16 6.020.

17 Intervenor responds that the county's silence regarding LDO 6.020 is a decision by  
18 the county under ORS 197.352(8)(2005) to "not \* \* \* apply" LDO 6.020, and that under  
19 ORS 197.352(9)(2005), this part of the county's decision is not a land use decision subject to  
20 LUBA's jurisdiction.<sup>12</sup> Thus, intervenor argues, LUBA does not have jurisdiction to decide

---

<sup>11</sup> LDO 6.020 provides in relevant part:

"1. There shall be direct legal access to and abutting on every lot or parcel. In addition, each anticipated homesite shall be capable of being provided access that meets minimum requirements for access by fire protection equipment."

<sup>12</sup> ORS 197.352 (2005) provides in relevant part:

"(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the

1 petitioners' challenge. Rather, intervenor argues, a challenge to the county's decision to "not  
2 \* \* \* apply" LDO 6.020 must be brought in circuit court through a writ of review.

3 We disagree with intervenor that the county's failure to address LDO 6.020 amounted  
4 to a decision to "not \* \* \* apply" that regulation under ORS 197.352(8). We also reject  
5 intervenor's argument that we do not have jurisdiction to review that part of the decision that  
6 is before us in this appeal. The decision that is before us on appeal specifically identifies  
7 certain regulations as exempt "health and safety regulations" that applied to the proposed  
8 subdivision. The decision also discusses other land use regulations, and finds that the  
9 proposal meets those other provisions of the LDO. If the county has determined that it may  
10 not apply LDO 6.020 to the subdivision because it was waived by the County Order and  
11 because it is not an exempt health and safety regulation, that determination must be  
12 explained in the decision. We will not construe the county's silence on the applicability of  
13 the regulation in the manner proposed by intervenor.

14 The fifth assignment of error is sustained. On remand, the county must determine  
15 whether LDO 6.020 applies to the subdivision and if it applies, it must determine whether the  
16 subdivision meets the criterion.

17 **C. Sixth Assignment of Error**

18 In their sixth assignment of error, petitioners argue that the county misconstrued LDO  
19 6.090, and that its findings addressing that provision are inadequate and are not supported by  
20 substantial evidence. In their first subassignment of error, petitioners argue that the county

---

governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

"(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10)."

1 has improperly failed to make a determination that the subdivision has an adequate quantity  
2 and quality of water as required by LDO 6.090.<sup>13</sup>

3 Intervenor responds by arguing that the county did not find that LDO 6.090 was an  
4 exempt health and safety regulation that applied to the subject property. Therefore, we  
5 understand intervenor to argue, the county's finding that the subdivision meets the criterion  
6 was not necessary for the decision, and any error the county made in applying LDO 6.090 is  
7 not a basis for reversal or remand of the decision.

8 As with the fifth assignment of error above, it is unclear from the decision whether  
9 the county determined that LDO 6.090 applies to the proposed subdivision because it is an  
10 exempt health and safety regulation. The relevant finding does not contain similar language

---

<sup>13</sup>LDO 6.090 is entitled "Water Supply" and provides:

"All lots within a partition or subdivision shall have an adequate quantity and quality of water to support the proposed use of the land. No final plat of a subdivision or partition shall be approved unless the Director and engineer have received and accepted:

- "1. A certification by a municipal, public utility or community water supply system, subject to the regulation by the Public Utility Commission of Oregon, that water will be provided to the parcel line of each and every parcel depicted in the final plat; or
- "2. A bond, contract or other assurance by the subdivider or partitioner to the county that a domestic water supply system will be installed on behalf of the subdivider or partitioner to the parcel line of each and every parcel depicted on the final plat.  
\* \* \*, or
- "3. A water well report filed with the State of Oregon Water Resources Department for each well provided within a subdivision or partition. The location of such wells and an appropriate disclosure shall be placed on the face of the final plat. If the subdivider or partitioner intends that domestic water will be provided to the proposed lot or lots by well(s) and no test wells have been drilled, the Director may require that test wells be drilled prior to final approval. The number and location of such wells shall be determined by the director and watermaster having jurisdiction; or
- "4. In lieu of Subsections (1), (2), and (3) of this Section, when a municipal, public utility, community water supply or private well system is not available, then a statement must be placed on the final plat or map which states:

"No municipal, public utility, community water supply or private well system will be provided to the purchaser of those lots noted hereon."

1 to other findings that unquestionably conclude that a regulation is a health and safety  
2 regulation.<sup>14</sup> The findings do note that “\* \* \* due to the applicant’s Measure 37 approval, no  
3 local land use approval is required to establish the community water system.” Record 9.  
4 Intervenor may be correct that the county did not think that LDO 6.090 is an exempt health  
5 and safety regulation, but we will not surmise that from the absence of language indicating  
6 that is what the county determined. On remand, the county must determine whether LDO  
7 6.090 is an exempt health and safety regulation that applies to the proposed subdivision, and  
8 if so, it must determine whether the criterion is met.

9 In their second subassignment of error, petitioners argue that the county erred in  
10 failing to determine whether the proposed subdivision would have off-site water supply  
11 impacts. Petitioners acknowledge that in our decision in *Paddock v. Yamhill County*, 45 Or  
12 LUBA 39 (2003), we concluded that LDO 6.090 does not require analysis of the  
13 subdivision’s off-site water supply impacts. However, petitioners argue that such a  
14 determination is required by Goal 1, Policies C and D of the Yamhill County Comprehensive  
15 Plan (YCCP), as well as Section II.C (Water Resources) of the YCCP.<sup>15</sup>

---

<sup>14</sup> For example, the county’s findings regarding LDO Section 6.010(1) state: “[t]he Planning Department believes the installation and completion of a safe road system is a matter of public safety.” Record 7. The findings regarding YCZO 403.10 state: “\* \* \* Section 403.10 of the [YCZO] lists fire siting and construction standards for dwellings in the AF-20 zone. Since these are safety standards they have not been removed, modified, or not applied. \* \* \*” Record 8. Finally, the county’s findings regarding LDO 6.100 state: “The provision of adequate sewage disposal is a health and safety issue that is exempt from Measure 37 so it will be required on any approval.” Record 9.

<sup>15</sup> Section I.B, Goal 1, Policies C and D of the YCCP require in relevant part a demonstration that:

“C. All proposed rural area development and facilities:

“1. Shall be appropriately, if not uniquely, suited to the area or site proposed for development.”

“\* \* \* \* \*

“D. No proposed rural area development shall require or substantially influence the extension of costly services and facilities normally associated with urban centers, such as municipal water supply \* \* \*.”

1           Intervenor responds that the county waived the application of the YCCP in the  
2 County Order, and argues that the provisions cited by petitioners are not applicable to the  
3 proposed subdivision because they are not exempt health and safety regulations. However,  
4 as explained above, because we understand the county to have deferred determination as to  
5 which health and safety regulations would continue to apply to the proposed subdivision  
6 during the subdivision approval process, we cannot assume from the county's silence that it  
7 determined that the approval criteria set forth in the YCCP cited by petitioners were not  
8 applicable to the subdivision because they were not health and safety regulations. On  
9 remand, the county must determine whether the provisions of the YCCP cited by petitioners  
10 are health and safety regulations that were not waived by the County Order, and if so,  
11 whether the subdivision complies with those provisions.

12           The sixth assignment of error is sustained.

13 **SEVENTH ASSIGNMENT OF ERROR**

14           In their seventh assignment of error, petitioners argue that the county erred in failing  
15 to determine whether the subdivision complies with ORS 215.730(1)(b)(C), under which  
16 local governments must require evidence that the water supply for a dwelling that is to be  
17 sited on forest land is from a source authorized by the Oregon Water Resources Department  
18 and is not from a Class II stream.

19           Intervenor responds that petitioners failed to raise this issue prior to the close of the  
20 record, and under ORS 197.763(1), petitioners cannot raise the issue for the first time in their

---

Section II.C of the YCCP contains a goal statement regarding water resources and provides in relevant part that one of the goals is:

- “1. To conserve and to manage efficiently our water resources in order to sustain and enhance the quantity and quality of flows for all consumptive and non-consumptive uses and to abate flood, erosion and sedimentation problems.”

1 appeal to LUBA. Petitioners have not responded to intervenor's assertion. We agree with  
2 intervenor that the issue is waived.<sup>16</sup>

3 The seventh assignment of error is denied.

4 **EIGHTH ASSIGNMENT OF ERROR**

5 In their eighth assignment of error, petitioners argue that the county's findings  
6 regarding LDO 6.100 are inadequate and are not supported by substantial evidence in the  
7 record. As noted above, the county determined that LDO 6.100 was an exempt health and  
8 safety regulation that applied to the subdivision. LDO 6.100 provides in relevant part:

9 "All lots within a partition or subdivision to be used for residential purposes  
10 shall have either an approved subsurface septic site evaluation or be  
11 connected to a sewer treatment facility approved by the State Department of  
12 Environment Quality. \* \* \*"

13 The county found:

14 "No public or city sewer services are available, so each lot will be required to  
15 be served by an individual on-site subsurface sewage disposal system. In  
16 August 2006 the applicant applied for septic site evaluations for each newly  
17 created parcel. In September 2006, the County Sanitarian completed review  
18 of the septic site evaluations for each proposed vacant parcel. Each proposed  
19 lot has approval for either a standard or alternative sewage system." Record  
20 9-10.

21 Petitioners argue that the septic evaluations that were the basis for the county's  
22 conclusion that each proposed lot has approval for a septic system were based on  
23 intervenor's 12-lot proposal, rather than his 10-lot proposal, and for that reason, the findings  
24 are not supported by substantial evidence. Intervenor responds that the record contains a  
25 letter dated March 22, 2007 from intervenor that explains that the 12 lots were all approved  
26 for a septic system, and that because intervenor reduced the proposal to 10 lots, there are two  
27 septic approvals for lots 1 and 2.

---

<sup>16</sup> Because we find the issue was waived, we need not address intervenor's other responses to the seventh assignment of error.

1           The original septic evaluations for the 12-lot proposal are found at Record 124-50.  
2   Those approvals specify where the septic systems and drainfields are to be located on the  
3   lots. When intervenor reconfigured the lots, however, it is possible that at least some of  
4   those approved locations may have changed due to a change in lot lines or dwelling  
5   locations. Those September, 2006 septic approvals do not specify where on each of the 10  
6   reconfigured lots the septic is to be located. To the extent that intervenor argues that a map  
7   found at Record 111 shows the location of each septic system on the 10-lot plot plan, we  
8   disagree with intervenor.<sup>17</sup>

9           We agree with petitioners that the evidence in the record regarding the septic  
10   approvals relates only to intervenor's 12-lot subdivision proposal, and that it was error for  
11   the county to rely on the September 2006 site evaluations and sanitarian review for the 12-lot  
12   proposal to conclude that each of the proposed 10 lots has approval for a septic system.  
13   Other than intervenor's assertion that lots 1 and 2 each have two septic approvals, there is no  
14   evidence in the record evaluating the availability or location of septic systems for the 10-lot  
15   proposal.

16           The eighth assignment of error is sustained.

#### 17   **NINTH ASSIGNMENT OF ERROR**

18           In their ninth assignment of error, petitioners argue that the county erred in  
19   determining that YCZO 403.10(B) was satisfied. YCZO 403.10(B) provides in relevant part  
20   that a dwelling shall not be sited on a slope of greater than 40 percent. The county found:

21           "The soils map shows that the north portion of the property, containing  
22   proposed lots 1-3 have slopes of 30-60 percent. Some of these proposed lots  
23   may not be able to have [dwellings placed] on them due to steep slopes.  
24   *Applicant has submitted a contour map with contour intervals at 5-feet that*  
25   *demonstrate that there are building sites that comply with this section on each*  
26   *of the proposed lots."* Record 8 (Emphasis added).

---

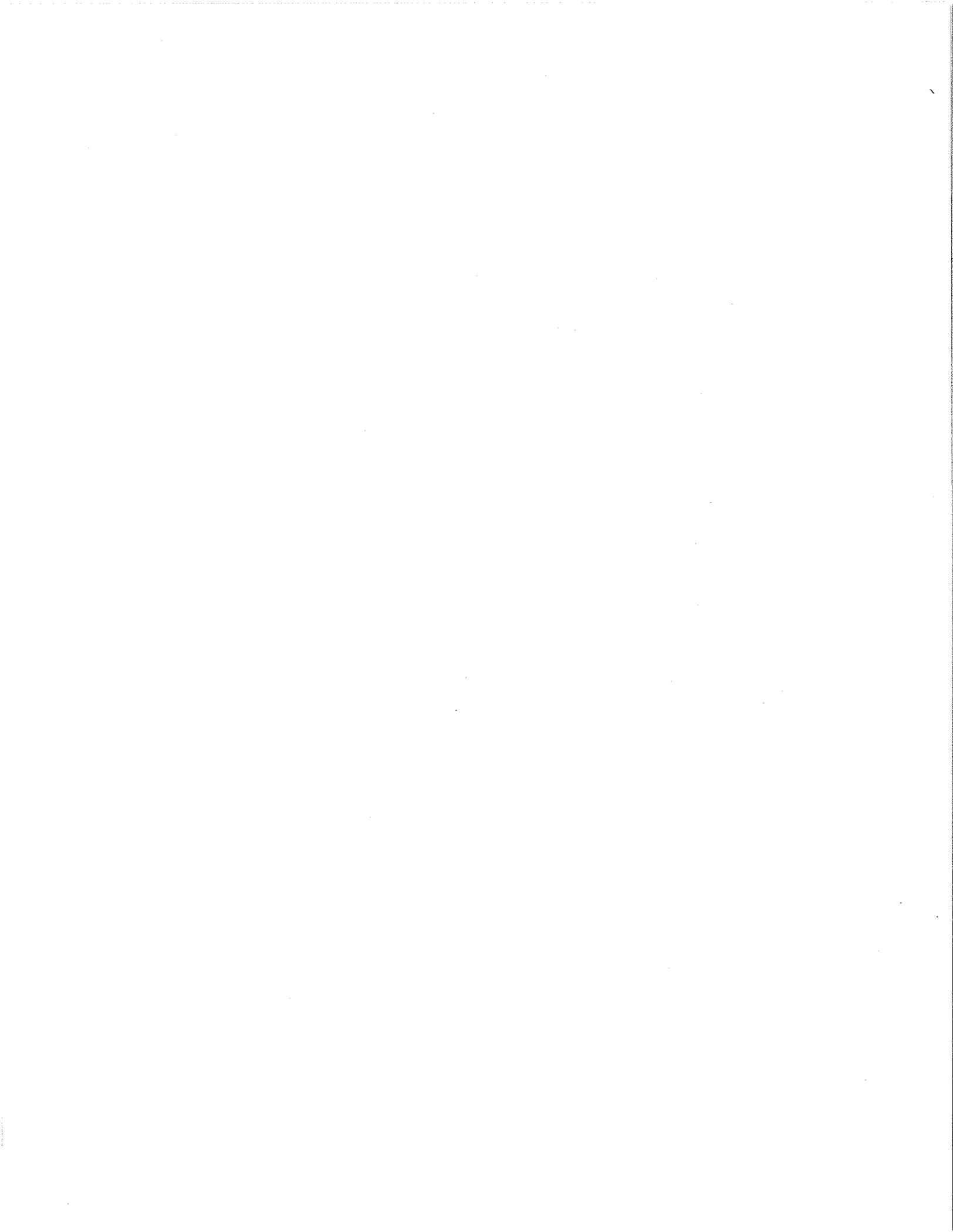
<sup>17</sup> Record 215 appears to be a larger copy of the same map that appears at Record 111, and it does not show the location of septic systems on any of the 10 lots.

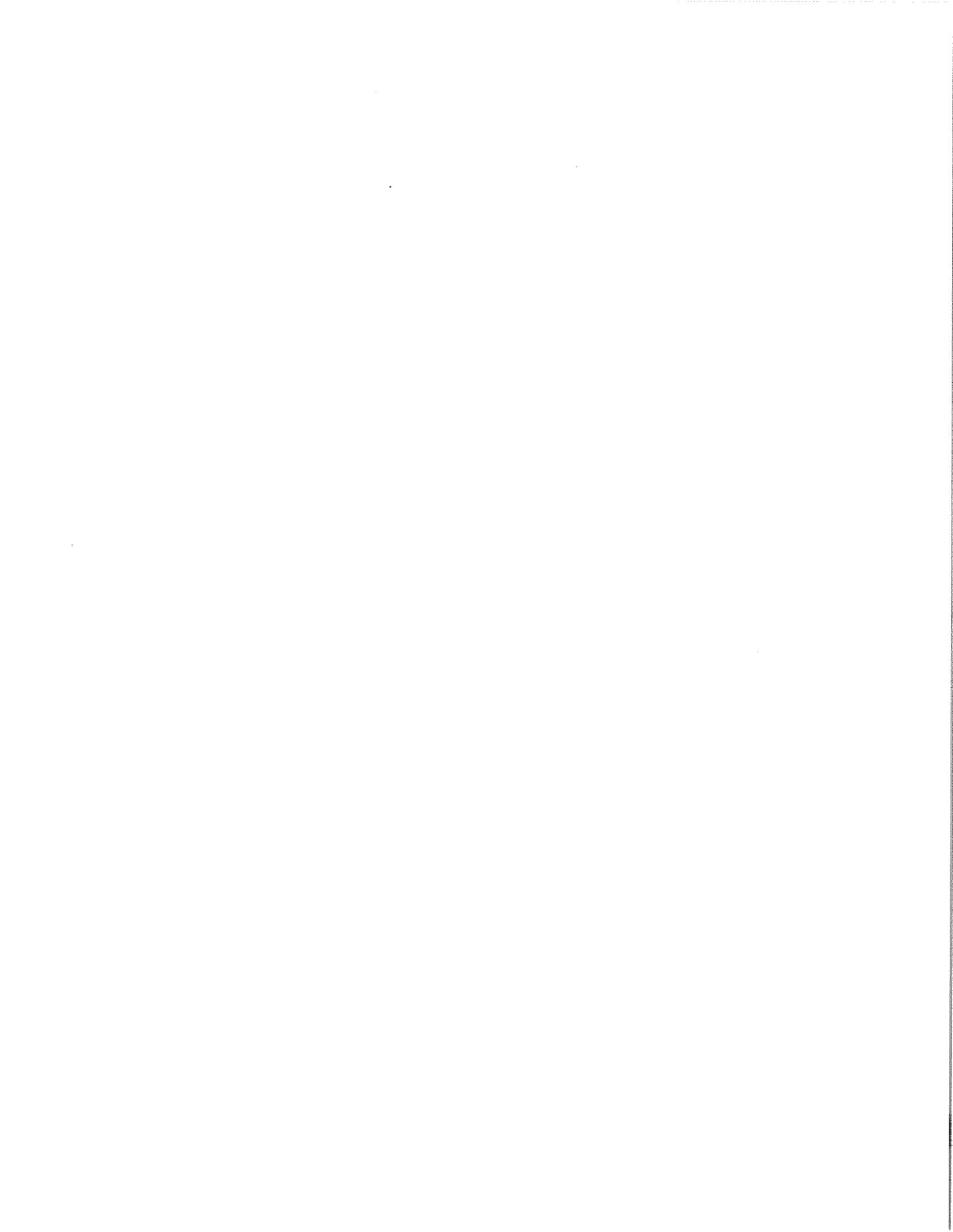
1 In addition to finding that each lot contains a building site that satisfies YCZO 403.10(B), the  
2 county imposed a condition of approval that prohibits the issuance of a building permit on  
3 lots 1, 2 and 3 until an engineer certifies that the soils on each of those lots are stable enough  
4 to support a dwelling, septic system, and water supply.

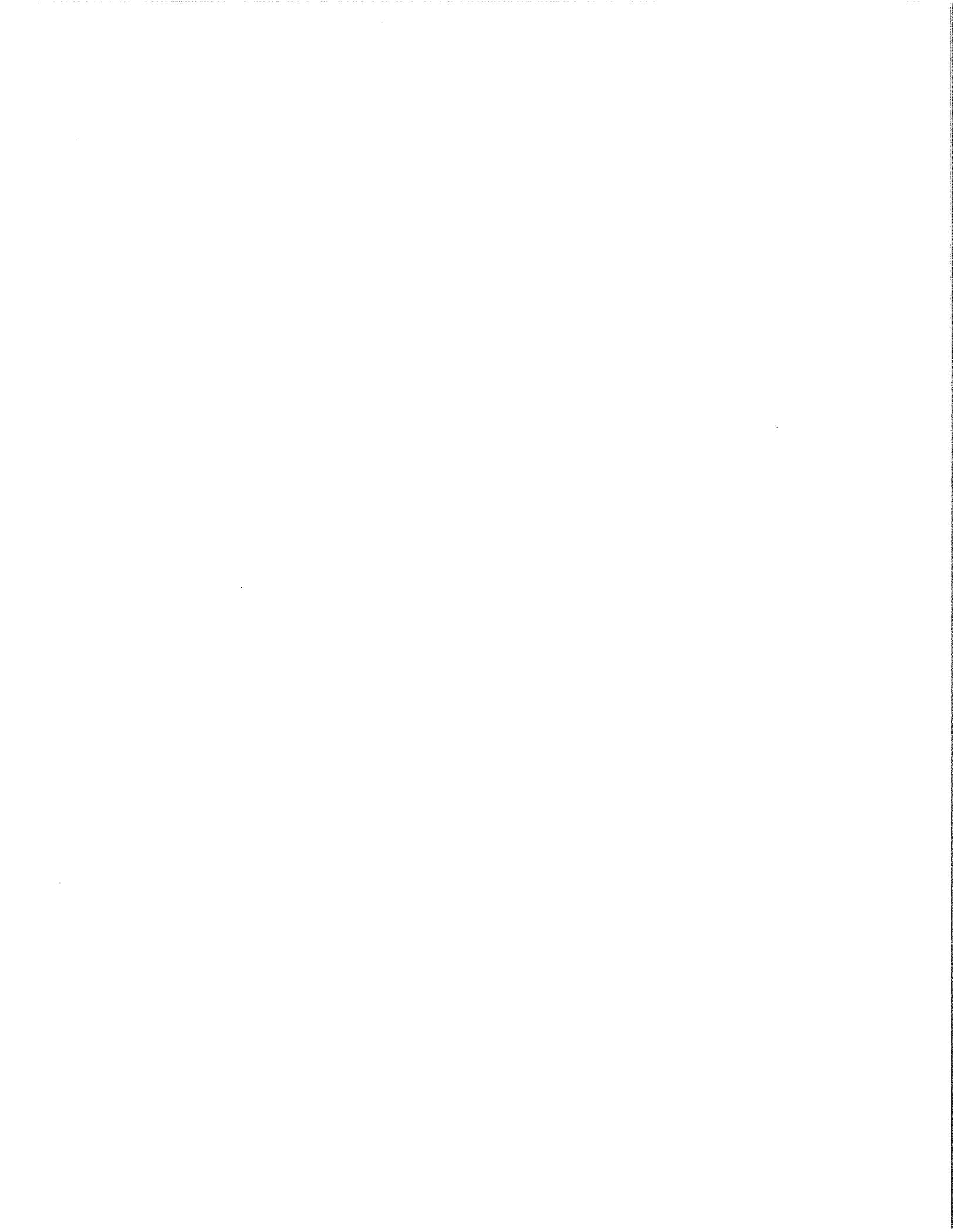
5 We understand the county to have found that although there was some initial question  
6 as to whether dwellings could be sited on the lots that had some slopes greater than 40  
7 percent, the applicant submitted enough information to show that each of the lots contain  
8 some portion that has slopes that are less than 40 percent. The condition of approval appears  
9 to separately require that the dwellings be located on stable soils. We see no error in the  
10 county's finding that YCZO 403.10(B) was satisfied and imposing a condition of approval  
11 that requires an additional certification by an engineer that the slopes on the lot are stable  
12 enough to support the dwelling.

13 The ninth assignment of error is denied.

14 The county's decision is remanded.







# Yamhill County

## DEPARTMENT OF PLANNING AND DEVELOPMENT

525 NE 4th STREET • McMinnville, OREGON 97128

Phone:(503) 434-7516 • Fax:(503)434-7544 • TTY: (800) 735-2900 • Internet Address: <http://www.co.yamhill.or.us/plan/>

### NOTICE OF PUBLIC HEARING

June 11, 2008 at 9:00 a.m.

Room 32, Yamhill County Courthouse

Fifth and Evans

McMinnville, Oregon

THE BOARD OF COUNTY COMMISSIONERS will hold a public hearing at the above time and place to consider the Land Use Board of Appeals (LUBA No. 2007-111) remand of the county's decision regarding the request described below. The hearing may start later than the time indicated, depending on the agenda schedule. **The hearing will be limited to accepting evidence and argument regarding only the following issue that formed the basis of the LUBA remand:**

1. Yamhill County Land Division Ordinance 5.010(E) and (M), a requirement that the plat show "[a]ppropriate identification of the drawing as a preliminary plat" as well as a requirement that to show "[t]he location of all existing and proposed structures on the area to be subdivided that are to be created or remain in place."
2. Yamhill County Land Division Ordinance 6.020. "On remand, the County must determine whether LDO 6.020 applies to the subdivision and if it applies, it must determine whether the subdivision meets the criterion."
  - a. "LDO 6.020 provides in relevant part:
    - i. There shall be direct legal access to and abutting on every lot or parcel. In addition, each anticipated homesite shall be capable of being provided access that meets minimum requirements for access by fire protection equipment."
3. Yamhill County Land Division Ordinance 6.090. "On remand, the County must determine whether LDO 6.090 is an exempt health and safety regulation that applies to the proposed subdivision, and if so [(if it is exempt)] it must determine whether the criterion is met."
4. Yamhill County Comprehensive Plan, Section I.B, Goal 1, Policies C and D, and Section II.C. "On remand, the county must determine whether the provisions of the YCCP cited by petitioners are health and safety regulations that were waived by the County Order, and if so, whether the subdivision complies with those provisions."

Section I.B, Goal 1, Policies C and D.

C. All proposed rural area development and facilities:

1. Shall be appropriately, if not uniquely, suited to the area or site proposed for development.

D. No proposed rural area development shall require or substantially influence the extension of costly services and facilities normally associated with urban centers, such as municipal water supply.

Section II.C.

To conserve and to manage efficiently our water resources in order to sustain and enhance the quantity and quality of flows for all consumptive and non-consumptive uses and to abate flood, erosion and sedimentation problems.”

5. Yamhill County Land Division Ordinance 6.100. On remand, the County must determine whether the criterion of LDO 6.100 are met.
- 

No other evidence or argument will be accepted. Interested parties are invited to send written comment or may appear and testify at the hearing. Failure to raise an issue, either in person or in writing, or failure to provide statements or evidence sufficient to allow the Board an opportunity to respond to the issue precludes an affected party's appeal of the decision to the Land Use Board of Appeals on that issue.

Failure to raise Constitutional or other issues relating to proposed conditions of approval with sufficient specificity to allow the County to respond precludes an action for damages in Circuit Court.

A staff report will be available for inspection at no cost seven days prior to the hearing, and copies will be available for purchase at a reasonable cost. All materials submitted by the applicant are also available for inspection, and copies may be purchased at a reasonable cost. For further information, contact Ken Friday at the Yamhill County Department of Planning and Development, 525 N.E. Fourth Street, McMinnville, OR 97128, or call (503) 434-7516.

Interested parties are invited to send written comment or may appear and testify at the hearing. Failure to raise an issue, either in person or in writing, or failure to provide statements or evidence sufficient to allow the Board an opportunity to respond to the issue precludes an affected party's appeal of the decision to the Land Use Board of Appeals on that issue.

---

**DOCKET NO.:** S-13-06

**REQUEST:** A remand of the Board of Commissioner's preliminary approval of a 10-lot subdivision on a 31.03 acre property. The proposed lot sizes are approximately 2.1 to 5' acres each. This application is being made subsequent to the approval of a Measure 37 claim which allows the applicant to apply for development under the land use regulations in effect on February 20, 1965. The details of the Measure 37 approval are found in Board Order 06-153 and State Claim M122329.

**APPLICANT:** Kroo Family Living Trust

**TAX LOT:** 2231-3900 and 4100

**LOCATION:** 18108 NE Bald Peak Road, Newberg, Oregon

**ZONE:** AF-20 Agriculture/Forestry Use

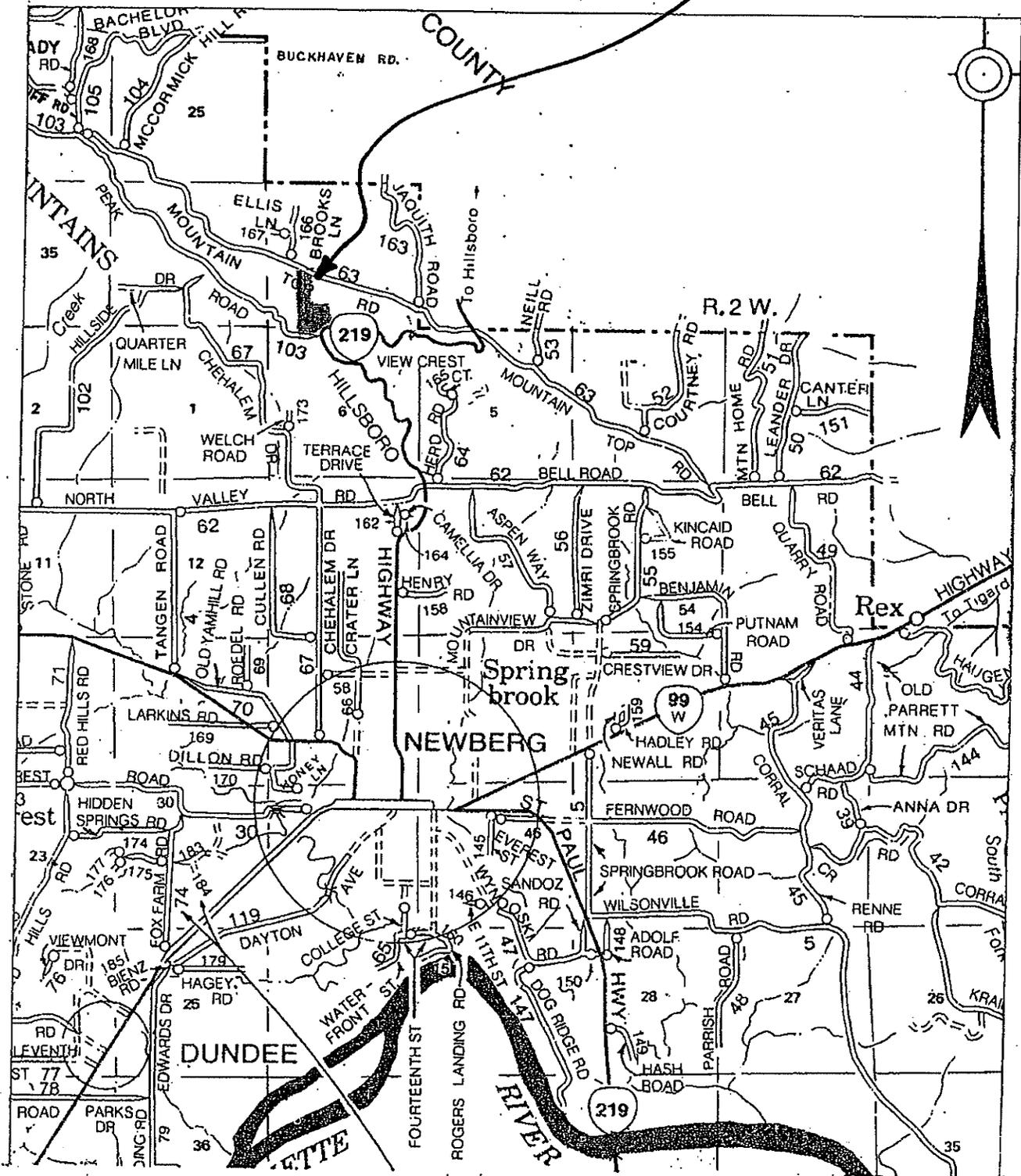
**REVIEW CRITERIA:** Board Order 06-153 and the *Yamhill County Land Division Ordinance*

**NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR, OR SELLERS:** ORS Chapter 215 require that if you receive this notice, it must be promptly forwarded to the purchaser.

# VICINITY MAP

LOCATION OF PROPERTY

N











# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

635 Capitol Street, Suite 150

Salem, OR 97301-2540

(503) 373-0050

Fax (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

June 3, 2007

VIA FACSIMILE: (503) 434-7544



Ken Friday  
Yamhill County Department of Planning and Development  
525 NE 4th Street  
McMinnville, OR 97128

RE: *File No. S-13-06, Kroo Subdivision Remand Hearing*  
*State Claim # M122329*

Dear Mr. Friday:

The Department of Land Conservation and Development (DLCD) has received the county's Notice of Public Hearing on the above-referenced land use action. The applicants supported their application based on "waivers" of certain land use regulations previously granted by the county and the state pursuant to ORS 197.352 (Ballot Measure 37). Please consider the following comments regarding this application and include this letter in the record.

The applicants' Measure 37 waivers have no further force or effect and therefore cannot support the requested subdivision. When Measure 49 became effective on December 6, 2007, all Measure 37 waivers were replaced with procedures that entitle a Measure 37 claimant to have his or her claim reviewed under Measure 49.

A public entity's authority to grant relief from applicable land use regulations that was formerly available under Measure 37 – "just compensation" or a "waiver" – was extinguished with the enactment of Measure 49. Consequently, all Final Orders issued under Measure 37 wherein a public entity agreed to "not apply" certain land use regulations to a claimant's use of his or her property expired with the public entity's authority. OAR 660-041-0060. This effect of Measure 49 was confirmed by the Court of Appeals in *Frank v. DLCD*, 217 Or App 498 (2008), and most recently by the Oregon Supreme Court in *Corey v. DLCD*, -- Or -- (DLCD M119478; CA A129905; SC S054995; May 8, 2008) ("Measure 49 conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners").

"In the end, we hold only that plaintiffs' contention that Measure 49 does not affect the rights of persons who already have obtained Measure 37 waivers is incorrect. In fact, Measure 49 by its terms deprives Measure 37 waivers -- and *all* orders disposing of Measure 37 claims -- of any continuing viability, \*\*\*. Thus, after December 6, 2007 (the

Ken Friday, Yamhill County

2

June 3, 2008

Regarding: *File No. S-13-06, Kroo Subdivision Remand Hearing*  
*State Claim # M122329*

effective date of Measure 49), the final order at issue in the present case had no legal effect.\*\*\*” *Id.*

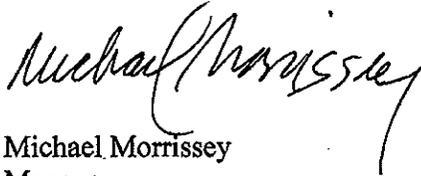
Measure 49’s effect on Measure 37 waivers applies regardless of whether a land use application was filed, unless a claimant establishes a common law vested right to complete and continue their use described in the waiver (which is not an issue here). Accordingly, ORS 215.427(3), providing that the approval or denial of an application shall be based upon the standards and criteria that were applicable at the time that application was first submitted, is inapplicable. *DLCD v. Jefferson County and Burk*, LUBA No. 2007-177.

Without a waiver of certain land use regulations, the county must apply all current approval criteria to the present application. Since the proposed subdivision is not allowed under the current zoning, the application should now be denied.

Please notify us of your decision and any further action taken on the application. If you would like to discuss this further, feel free to contact me at (503) 373-0050 x 320, or Carmel Bender at (503) 373-0050 ext. 326.

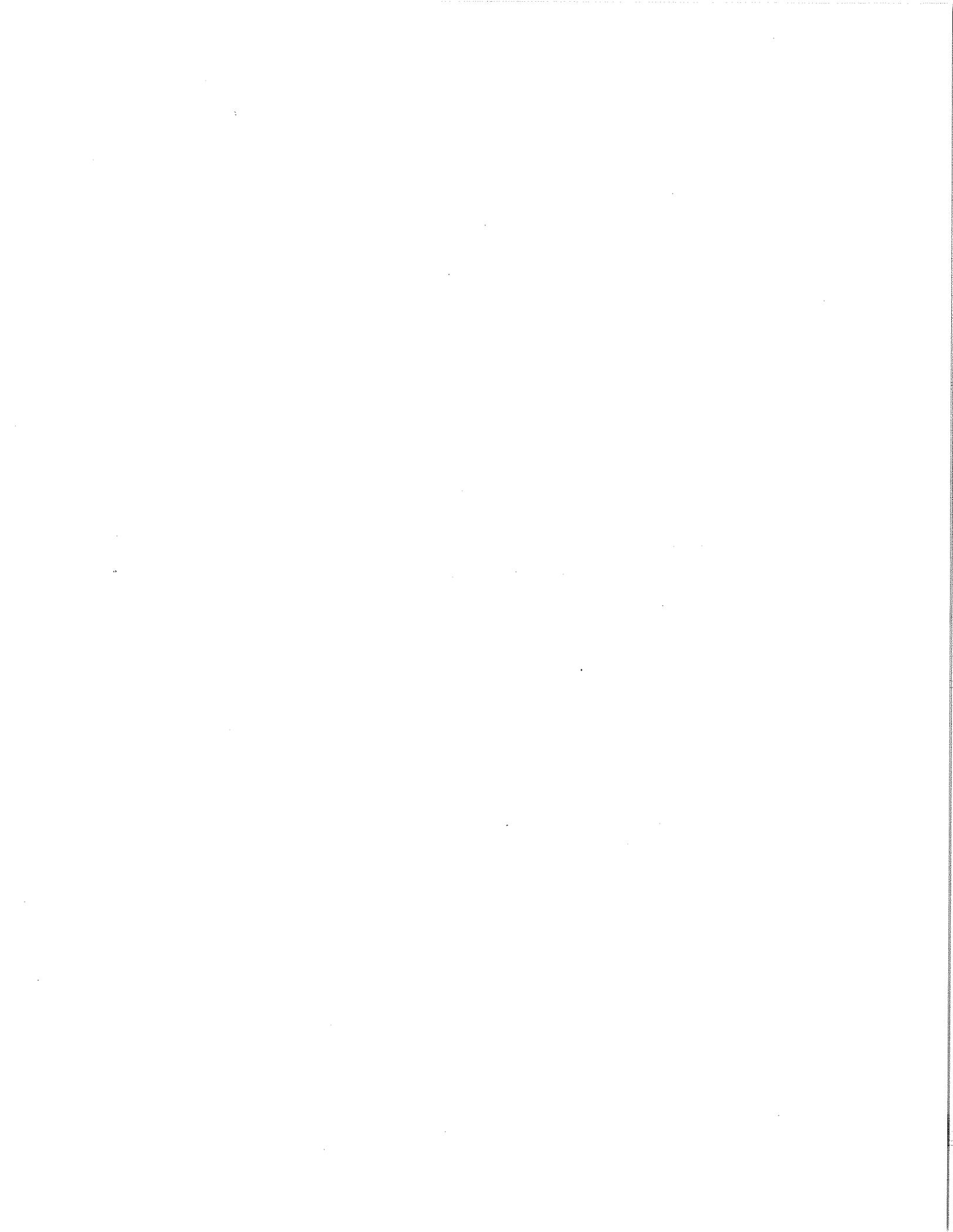
Thank you for your courtesies.

Yours very truly,



Michael Morrissey  
Manager  
Measure 49 Development Services Division

cc: Virginia Gustafson, DOJ (by email)  
Richard Whitman, DLCD (by email)  
Gary Fish, DLCD (by email)





BEFORE THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Approval on Remand of a 10 Lot Subdivision )  
on a 31.03 Acre Parcel Located at 18108 NE Bald Peak Road, ) Board Order 08-480  
Docket S-13-06, Tax Lots 2231-3900 & 2231-4100, Applicant )  
John Kroo, Trustee of the Kroo Family Trust )

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the "Board") sat for the transaction of county business on July 9, 2008, Commissioners Mary P. Stern, Leslie Lewis and Kathy George being present.

IT APPEARING TO THE BOARD that John Kroo, Trustee of the Kroo family Trust, was granted approval of a subdivision on a 31.03 acre parcel located at 18108 NE Bald Peak Road, Newberg, Yamhill County, Oregon, Tax Lots 2231-3900 and 2231-4100 on a 2-1 vote (Commissioner Stern voting no) and that approval was appealed to the Land Use Board of Appeals, which remanded the decision to the Board, and

IT APPEARING TO THE BOARD that the matter was heard at duly noticed public hearings on June 11 and 18, 2008, after which the Board voted 2-1 for approval (Commissioner Lewis voting no), NOW, THEREFORE,

IT IS HEREBY ORDERED BY THE BOARD, that the application is again approved as detailed in the Findings for Approval, attached as Exhibit "A" and by this reference incorporated herein. The Board acknowledges that independent Hearings Officer Todd Sadlo has determined that the applicant's M37 developments rights have not vested. Mr. Sadlo's decision is not part of the Record of this decision.

DONE this 9<sup>th</sup> day of July, 2008, at McMinnville, Oregon.

ATTEST:

YAMHILL COUNTY BOARD OF COMMISSIONERS

JAN COLEMAN  
County Clerk



*Mary P. Stern*  
Chair

MARY P. STERN

By: *Anne Britt*  
Deputy Anne Britt

*Leslie A. Lewis*  
Commissioner

LESLIE LEWIS

APPROVED AS TO FORM:

*Kathy George*  
Commissioner

KATHY GEORGE

*Rick Sanai*  
Rick Sanai, Assistant County Counsel

**Exhibit "A" - Findings for Approval, Docket S-13-06 (Kroo)**

**ORIGINAL**

**HEARING DATES:** January 10, 2007  
February 14, 2007  
March 7, 2007  
April 11, 2007  
May 9, 2007  
May 23, 2007

**HEARING DATES**

**ON REMAND:** June 11, 2008, June 18, 2008

**APPLICATION NO.:** S-13-06

**REQUEST:** Approval of a 10-lot subdivision on a 31.03-acre property located at 18108 NE Bald Peak Road, Newberg, Oregon.

**APPLICANT:** John Kroo, Trustee of the Kroo Family Living Trust

**PROPERTY OWNER:** John Kroo and Elisabeth Kroo, Trustees of the Kroo Family Trust

**TAX LOT:** 2231-3900 & 2231-4100

**LOCATION:** 18108 NE Bald Peak Road, Newberg, Oregon

**ZONE:** AF-20, Agriculture/Forestry Large Holding

**REVIEW CRITERIA:** Yamhill County Land Division Ordinance ("YCLDO") 5.010(E) and (M); YCLDO 6.020; YCLDO 6.090; Yamhill County Comprehensive Plan ("YCCP") Section I.B, Goal 1, Policies C and D and Section II.C.; and YCLDO 6.100.

**A. Background Facts**

1. In August 2006, Applicant applied to subdivide the subject property into 12 lots. The planning commission approved the subdivision application, and interested parties appealed the matter to the Board of Commissioners. Applicant reduced the number of lots to 10. On May 9, 2007, the Board of County Commissioners voted to deny an appeal of the application in S-13-06 and approved the application as detailed in Board Order 07-442. On May 23, 2007, the Board of Commissioners approved a 10-lot subdivision. Interested Parties (Appellants to S-13-03) appealed this decision to the Land Use Board of Appeals (LUBA). On February 20, 2008, LUBA issued an opinion remanding the case to the County, LUBA No. 2007-111. In that opinion LUBA found:

(1) the County erred in failing to correctly apply YCLDO 5.010(E) and (M) requiring that the "plat show '[a]ppropriate identification of the drawing as a preliminary plat' as well as a requirement that [the map show] '[t]he location of all

existing and proposed structures on the area to be subdivided that are to be created or remain in place.”

(2) the County erred in not determining if LDO 6.020 applies to the subdivision and if it applies whether the subdivision application meets the criterion of LDO 6.020.

(3) The County erred in not determining if LDO 6.090 is an exempt health and safety regulation that applies to the proposed subdivision, and if it does apply to the application, whether its criterion are met.

(4) The County erred in not determining whether Yamhill County Comprehensive Plan Section I. B. Goal 1, Policies C and D and Section II.C. are health and safety regulations that apply to the application, and if any or all of these policies do apply to the application, whether the application meets the applicable policies with regard to off-site water supply impacts.

(5) The County erred in not determining if the criterion of LDO 6.100 are met by the application.

2. Parcel Size: 31.03 acres.
3. Access: Vehicle and Emergency Vehicle access is provided to lots 2 to 10 from Bald Peak Road, via, Bald Peak Lane, Bald Peak Private Drive, and Three-House Drive. Vehicle and Emergency Vehicle access to Lot 1 is provided from Mountain Top Road.
4. On-site Land Use: The 10-lot subdivision is described by the 10-lot Preliminary Subdivision map revised March 19, 2008, and again revised May 23, 2008, which depicts access roads for each lot, site locations for dwellings on each lot, and septic system locations for each lot.
5. Surrounding Area: The area surrounding the cell site is zoned EF-20 and EF-40. There is a mixture of agricultural uses with associated residences. A large portion of the surrounding acreage is devoted to growing grapes and orchards mixed with forestry uses.
6. Water: Existing water is provided by a spring and subsurface well. Future water will likely be provided by subsurface wells.
7. Sewage Disposal: The preliminary subdivision map demonstrates, and review of the County sanitarian reports in the file for S-13-06 confirm, that each of the proposed 10 lots has an approved subsurface sewage disposal evaluation.
8. Fire Protection: Newberg Rural Fire Protection District.
9. Previous Land Use Actions: There is one existing dwelling on lot 9.

## **B. Ordinance Provisions and Analysis**

The hearing was limited to accepting evidence and argument regarding only the following issues that form the basis for the LUBA remand.

1. On remand the County must apply Yamhill County Land Division Ordinance 5.010(E) and (M), requirements that the plat show "[a]ppropriate identification of the drawing as a preliminary plat" as well as a requirement that to show "[t]he location of all existing and proposed structures on the area to be subdivided that are to be created or remain in place."

**FINDINGS:** Applicant has submitted a preliminary subdivision plat map, revised as of March 19, 2008, and revised again as of May 23, 2008, clearly identified as a "preliminary subdivision plat" and also depicting all existing structures and proposed structures on each of the 10 lots of the proposed subdivision. Applicant has satisfied the criteria of LDO 5.010(E) and (M).

2. Yamhill County Land Division Ordinance 6.020. "On remand, the County must determine whether LDO 6.020 applies to the subdivision and if it applies, it must determine whether the subdivision meets the criterion."
  - a. "LDO 6.020 provides in relevant part:
    - i. There shall be direct legal access to and abutting on every lot or parcel. In addition, each anticipated homesite shall be capable of being provided access that meets minimum requirements for access by fire protection equipment."

**FINDINGS:** LDO 6.020 is exempt under ORS 197.352 (2005) and applies to the application. Applicant has submitted a revised 10-lot plat map with 5-foot contour lines identifying three gravel roads or drives: 1) Bald Peak Lane; 2) Three-House Drive; and 3) Bald Peak Private Drive. Applicant also submitted 9 photos of the roads on the subdivision property showing actual access to lots.

As demonstrated by the Preliminary Plat Map and Applicant's submitted photos, lots 5, 6 and 7 are served by Three-House Drive which provides the required fire-protection access. Not only are the lots capable of being provided access, but each lot currently has access. There is no significant slope on Three-House Drive and the photo demonstrates that road improvements for access have already been made. As demonstrated by the Preliminary Map, lots 3, 4, 8, 9 and 10 are served by Bald Peak Lane, a pre-existing gravel road depicted by photo (Exhibit "2") attached to Applicant's submission of March 25, 2008. Each of these five lots are clearly capable of being accessed by fire protection equipment from Bald Peak Lane. The fire marshal by letter of April 7, 2007 has opined that fire access is acceptable.

As demonstrated by the Preliminary Plat Map, lot 2, is accessed by Bald Peak Private Drive. In addition, photos attached to Applicant's Submission of March 25, 2008 show the improved drive and also show emergency vehicles on the drive going up to the house site depicted on the preliminary subdivision plat map (10-lot). These same emergency vehicles would necessarily have traveled up Bald Peak Lane in order to access Bald Peak Private Drive. In the record is a letter of April 6, 2007, from the fire marshal confirming what is clearly demonstrated from the photos, that there is current fire-protection-equipment access to lot 2. In a letter of April 6, 2007, the fire marshal opined that "[b]ased on my inspection and driving [see photos] a pumper truck up the access road 4-6-07, Newberg Fire approves the new road."

Finally, the Preliminary Plat Map demonstrates that there is direct access to Lot 1 from Mountain Top Road, a county road.

The application satisfies the criteria of LDO 6.020.

3. Yamhill County Land Division Ordinance 6.090. "On remand, the County must determine whether LDO 6.090 is an exempt health and safety regulation that applies to the proposed subdivision, and if so [(if it is exempt)] it must determine whether the criterion is met."

**FINDING:** The following portion of LDO 6.090 is exempt from the waiver of land use regulations and applies to the application: "All lots within a partition or subdivision shall have an adequate quantity and quality of water to support the proposed use of the land."

**FINDING: Quality.** The record indicates that there is currently drinking quality water available on the property. (Rec. 318, 319). The Applicant uses water on the property currently for domestic use. There is an existing house with existing water source. The area is also home to a nearby spring which provides drinkable water to the City of Newberg. Rec. 224. A Certificate of Water right shows sufficient water on the proposed subdivision property for "domestic use" and stock. Rec. 318-19. There appears to be no doubt that water on the property is of a sufficient quality to support dwelling use as proposed by the subdivision application.

**Quantity.** The Applicant provided the County with historic data showing water use from the property of 2,016,000 gallons per 35 day period or 57,600 gallons per day. Rec. 87. The Groundwater Solutions memorandum of February 8, 2007, compared historic data on irrigation demand with the potential demand from domestic use of 12 homes (12-lot subdivision). Rec. 224. The Groundwater Solutions report concluded that a 12-lot subdivision would use approximately 110% of the annual discharge rate for domestic use. Rec. 225. The proposed subdivision has been reduced through the application process to only 10-lots and would therefore have a predicted domestic use of less than the annual discharge rate. With the reduction of the subdivision to 10 lots, there appears to be sufficient quantity of water to support the proposed dwelling use, and support the use without affect to the overall water source.

In a previous case, LUBA found that where there was minimal evidence of water on the property, and the County required compliance with LDO 6.090 (which includes the option of not supplying water), the applicant has demonstrated an "adequate" water supply for purposes of a subdivision. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003). In *Paddock*, neither the County, nor LUBA interpreted LDO 6.090 to require testing for explicit safety or health reasons.

**FINDING:** The remaining subsections of LDO 6.090 (requiring that "No final plat of a subdivision or partition shall be approved unless the Director and engineer have received and accepted: 1. A certification . . . . 2. A bond . . . . 3. A water well report . . . . ; or 4. In lieu of Subsection (1), (2), and (3) . . . . a statement . . . .") are also exempt from the waiver of land use regulations, in that these requirements implement Yamhill County Comprehensive Plan, Section II.C. (conserve and to manage efficiently our water resources). By requiring the applicant to satisfy one of these requirements, the County is managing and potentially conserving the water resource by requiring the applicant to utilize a public water resource or create a private resource satisfying State regulation. In particular, these requirements either demand that the applicant provide a public water supply, a private assurance of a water supply, an actual private supply of water, or disclose no supply will be provided. In requiring a water supply (or assurance) or a disclosure that the purchaser must provide their own water, the County manages the resource by encouraging the applicant to provide a water supply or suffer the impact of the disclosure (of no water) on any future sale price. Disclosure of no water on the plat also tends to conserve the water resource by discouraging purchasers of land who require water. While the applicant is not prohibited from subdividing the property without an actual water source, there is an incentive to provide a water source. The disclosure also provides a disincentive to purchasers of subdivision parcels who need a supply of water. The Board understands that the applicant will comply with this portion of LDO 6.090 and approves the application on that basis.

4. Yamhill County Comprehensive Plan, Section I.B, Goal 1, Policies C and D, and Section II.C. "On remand, the county must determine whether the provisions of the YCCP cited by petitioners are health and safety regulations that were waived by the County Order, and if so, whether the subdivision complies with those provisions."

**Section I.B, Goal 1, Policies C and D.**

C. All proposed rural area development and facilities:

1. Shall be appropriately, if not uniquely, suited to the area or site proposed for development.

D. No proposed rural area development shall require or substantially influence the extension of costly services and facilities normally associated with urban centers, such as municipal water supply.

**FINDINGS:** The Board of Commissioners finds that the unique suitability of an area or site to a particular use is not an exempt restriction, and this regulation is therefore waived and will not be applied to this application. The Board also finds that the cost of extension of services is not an exempt regulation, and this regulation is therefore waived and not applied to this application. Even if the cost of extension of services were an exempt regulation, there is no evidence in this record that this subdivision is creating any cost for extension of services and/or facilities to an urban center or municipal utility.

#### **Section II.C.**

To conserve and to manage efficiently our water resources in order to sustain and enhance the quantity and quality of flows for all consumptive and non-consumptive uses and to abate flood, erosion and sedimentation problems."

**FINDINGS:** Policy Section II. C. is an exempt regulation in that this policy directly relates to the quantity and quality of flows of water. The policy also governs abatement of flood, erosion and sedimentation problems. The application in S-13-06 and supporting documentation satisfies the requirements of the policy to conserve and manage water resources with regard to flood, erosion and sedimentation with the submission of the detailed drainage plan. The drainage plan in the record provides detailed plans to allow the applicant to proceed with development while at the same time avoiding drainage problems, erosion and sedimentation. The drainage report offers a determination of existing storm water patterns, storm water runoff (onsite and offsite), and offers recommendations for improvements to control runoff. Rec. 154. The preliminary subdivision plat (contour map) also shows planned drainage to include culverts under roadways. The planning and study provided by the applicant demonstrates that the County has acted to conserve and manage the water resource for all uses. There is no evidence in the record that the property has any history of flooding, or that flooding is in any way likely.

With regard to sustaining and enhancing the quantity and quality of water flows for consumptive and nonconsumptive uses, the County has reviewed information from the City of Newberg indicating that due to the location of the proposed development, predicted subdivision water use will not affect the quality of a nearby City water source (Skelton Springs) (Rec. 416). Further, initially the size of the proposed subdivision was believed to pose a potential consumptive domestic use of 110% of the annual recharge rate for the local aquifer. Rec. 224. However, by reducing the proposed subdivision to 10 lots from 12, the potential domestic use for the entire subdivision is reduced to below the 100% recharge rate (allowing the aquifer to recharge). While the County recognizes that there is no guarantee on volume of domestic use of water, the reduction in the number of lots is a reasonable effort to conserve and manage the water resource based on the data in the record. The County also inquired of the Oregon Water Resources Department ("OWRD") about the potential impact of water use on the property to other water users (in particular, the City of Newberg). The County learned that a transfer of the current irrigation right on the property to domestic use would trigger a review process by the OWRD. This review may include an evaluation of the impact on surrounding water users. While recognizing that the water supply in the area of the property is limited, the Board is satisfied that there is a sufficient quantity of water on the property for the proposed use. The Board is also satisfied that current state regulation provides an avenue to regulate actual use, if the actual use of water exceeds what is merely sufficient for the proposed dwelling use and negatively impacts surrounding water users.

5. Yamhill County Land Division Ordinance 6.100. On remand, the County must determine whether the criterion of LDO 6.100 are met.
  - a. The relevant criteria in this case reads:
    - i. No plat or a subdivision or partition shall be approved unless the Director and engineer have received and accepted: \* \* \*

1. \*\*\*
2. Certification by the county sanitarian that an approved subsurface sewage disposal site has been located on the proposed parcel to the specifications prescribed in the State Department of Environmental Quality. . . .
3. A bond, contract, or other assurance by the subdivider or partitioner to the county that a sewage-disposal system, septic tank drainfield or surveyed drainfield area will be installed or provided by or on behalf on the subdivider or partitioner for each and every parcel depicted on the final plat. . . .
4. In lieu of, or in combination with Subsections (1), (2), and (3), of this Section, a statement shall be placed on the face of the final plat or map which states:
 

"A subsurface site evaluation or an alternative sewer treatment facility has been approved and authorized by the State of Oregon Department of Environmental Quality for those lots noted thereon."

  - a. A City owned or privately owned sewage disposal system is not available, or
  - b. Lots are over 2 ½ acres in size, or
  - c. An alternate sewage treatment facility has been approved and authorized by the State of Oregon Department of Environmental Quality.

**FINDINGS:** LDO 6.100 is an exempt regulation and applies to the application.

After return of the application (S-13-06) to the County on remand from the Land Use Board, the County, through its sanitarian, has reviewed the Approvals of Alternative Sewage Systems, Reports of Evaluations and Existing System Evaluation for the Property. These evaluations were initially generated when the subdivision was composed of 12 lots. However, as demonstrated by a comparison of the revised 10-lot Preliminary Subdivision Plat map (of March 19, 2008, and May 23, 2008), with the 12-lot plat map of May 30, 2006 it is apparent that 8 of the 10 lots retain the same dimensions. Four of the lots have been merged into two lots. From the 12-lot map, lots 1 and 2 are now shown as lot 1 on the 10-lot map. From the 12-lot map, lots 3 and 4 are now shown as lot 2 on the 10-lot map.

The remaining lots have not changed in dimension, although, as indicated by the Memo to the County File from the County Sanitarian, the numeric designator of each lot as been reduced by "two." Lot 5 became lot 3, lot became lot 4, etc. As demonstrated by the amended evaluation report and the accompanying memo, each lot in the 10-lot subdivision has an approved subsurface sewage disposal site.

In addition, the record contains the Certificate of Satisfactory Completion of actual installed septic systems on seven of the 10 lots. This is demonstrated by materials in the record accompanying Memorandum from Samuel R. Justice, dated March 2, 2008, with copies of certifications for lots numbered in accord with the 10-lot map of March 19, 2008 (lots 2, 5, 6, 7, 8, 9 (existing system) and 10).

With regard to lots 2, 5, 6, 7, 8, 9 and, 10, the applicant has satisfied the criteria for approval under LDO 6.100(2) (site approval) and LDO 6.100(3) (assurance of installation).

With regard to lots 1, 3, and 4, the application has satisfied the criteria for approval under LDO 6.100(2) (site approval).

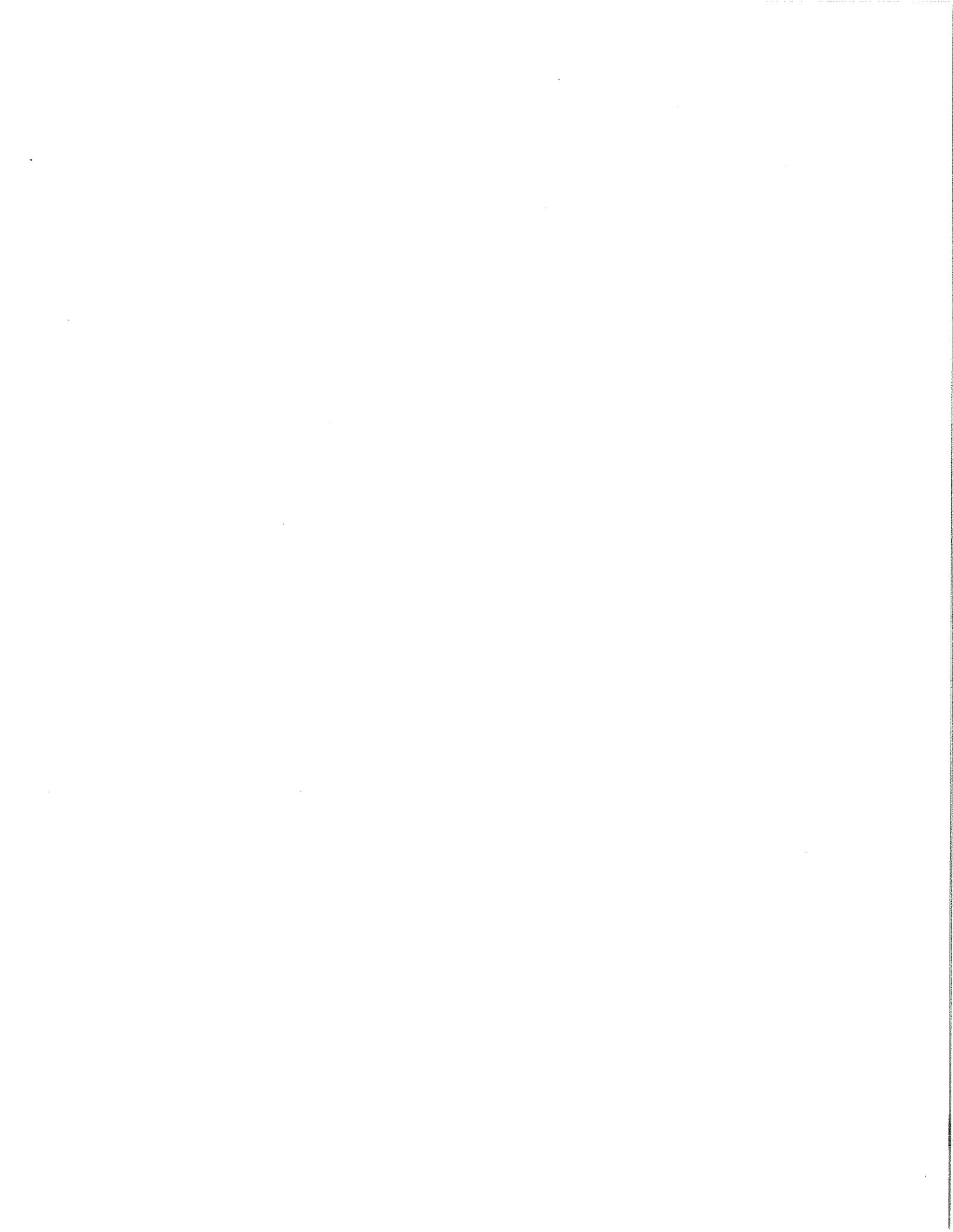
The applicant is also capable for all lots over 2.5 acres of satisfying LDO 6.100(4) by placing the necessary disclosure (re: site evaluation) on the plat. Lots capable of satisfying this requirement include lot 1 (5 acres), lot 3 (3.2 acres) and lot 4 (2.8 acres).

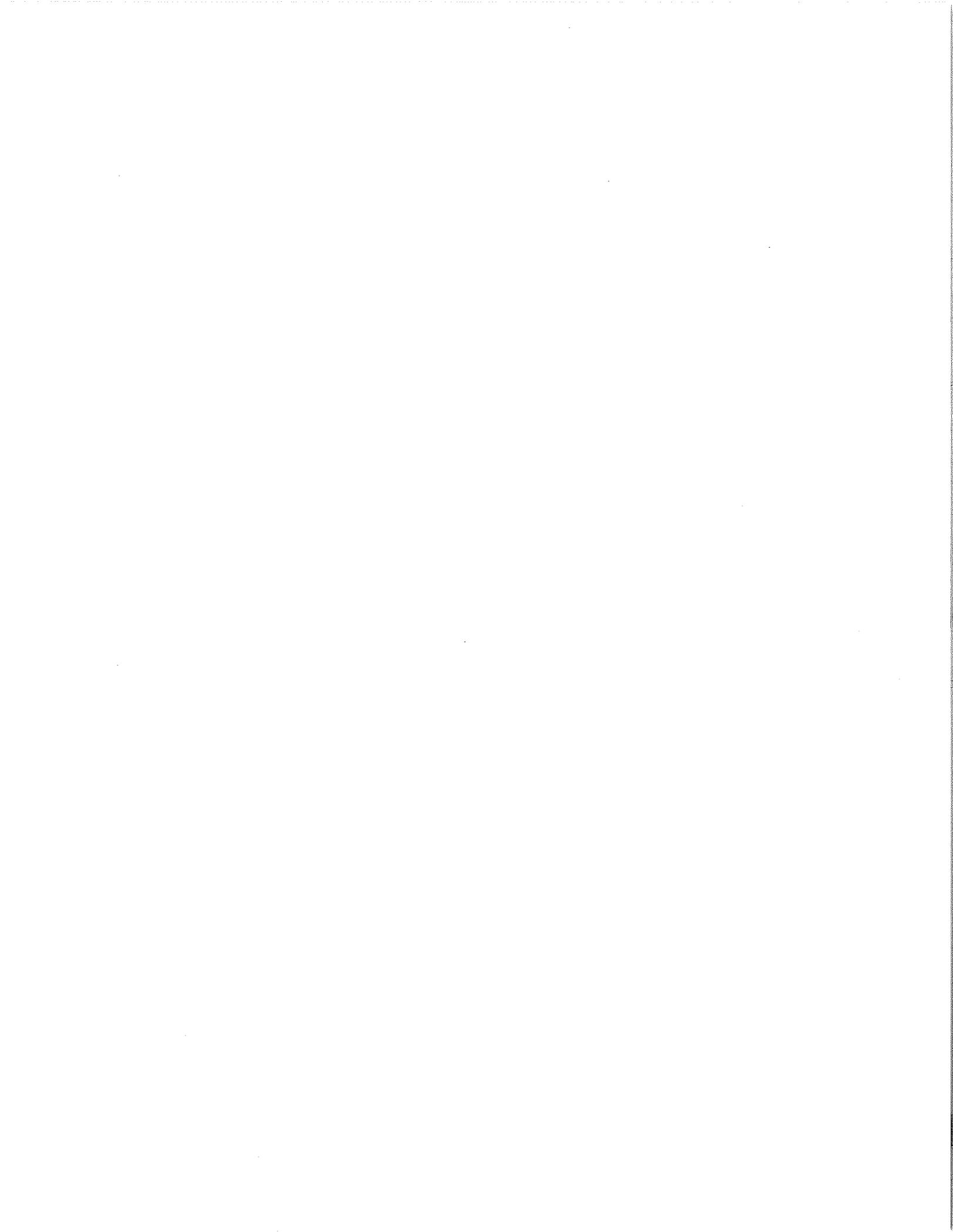
Each lot having satisfied the requirements of LDO 6.100 by at least two methods, the applicant has met the criteria for approval of the subdivision under LDO 6.100.

**CONCLUSIONS:**

1. Applicant has submitted a preliminary subdivision plat map that satisfies that requirements of LDO 5.010(E) and (M).

2. The record indicates that the each lot has legal access and each anticipated homesite is capable of being provided access that meets minimum requirements for access by fire protection equipment.
3. LDO 6.090, requiring the County to find that the subdivision has an adequate quantity and quality of water is an exempt regulation and applicable to S-13-06. The applicant has satisfied the criteria of LDO 6.090 by demonstrating a history of drinking quality ground water both on the property and in the area (quality). The applicant has satisfied this requirement with regard to an adequate quantity of water by demonstrating a history of water use beyond an amount reasonably necessary for sustained domestic use (by 10 dwellings).
4. Section I.B, Goal 1, Policies C and D of the Comprehensive Plan are not exempt regulations and are therefore not applicable to this application. Section II. C. of the Comprehensive Plan requiring conservation and management of the water resource is an exempt regulation. Applicant has complied with this regulation by reducing the number of lots in the subdivision from 12 to 10. Further, the County satisfies this goal/policy by requiring the applicant satisfy assurance or disclosure requirements of LDO 6.090, incenting the applicant to enhance the water resource.
5. LDO 6.100 is an exempt regulation and applicable to the approval of the application. Applicant has satisfied LDO 6.100 by demonstrating that each of the lots of the 10-lot subdivision as described in the preliminary subdivision plat of March 19, 2008 (revised May 23, 2008) has an approved subsurface sewage disposal site.





HARDY MYERS  
Attorney General



PETER D. SHEPHERD  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

July 29, 2008

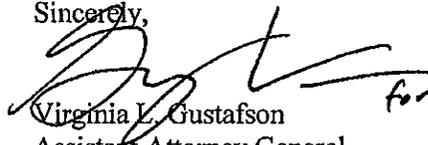
Kelly Burgess  
Debra Frye  
Land Use Board of Appeals  
550 Capitol Street N.E., Suite 235  
Salem, OR 97301

Re: DLCD v. Yamhill County  
DOJ File No.: 660-010-GN0377-08

Dear Kelly and Debra:

Enclosed for filing are the original and two copies of the Department of Land Conservation and Development's Notice of Intent to Appeal in the above referenced matter.

Sincerely,

  
Virginia L. Gustafson  
Assistant Attorney General  
Natural Resources Section

VLG:mme/634602  
Enclosure  
c: Service List





1 Stan Gaibler  
2 14045 NE Tangen Rd.  
Newberg, OR 97132

Harry Potts  
18505 NE Bald Peak Rd.  
Newberg, OR 97132

3 Water Resource Department  
4 Attn: Bill Ferber  
5 725 Summer St. NE  
Salem, OR 97301-1271

Brett A. Veatch  
2501 Portland Rd.  
Newberg, OR 97132

6 Department of Environmental Quality  
7 Attn: Tim Mcfetridge  
750 Front St. NE, Suite 120  
Salem, OR 97301

8 V.

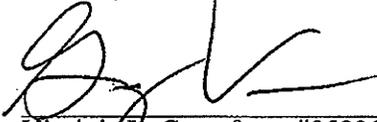
9  
10 Purchase order # 70268 in the amount of \$325.00 for filing fees and costs accompanies  
11 this notice.

12 NOTICE: Anyone designated in paragraphs III or IV of this Notice who desires to  
13 participate as a party in this case before the Land Use Board of Appeals must file a Motion to  
14 Intervene in this proceeding with the Board as required by OAR 661-010-0050.

15 DATED this 29<sup>th</sup> day of July 2008.

16  
17 Respectfully submitted,

18 HARDY MYERS  
Attorney General

19  # 075832  
20 for  
21 Virginia L. Gustafson, #85221  
22 Assistant Attorney General  
Of Attorneys for Petitioner