

**BEFORE THE LAND USE HEARINGS OFFICER  
OF CLACKAMAS COUNTY, OREGON**

Regarding appeals by William & Laurie Rumsey and Ben & Sandra Bole of an administrative decision approving a three lot M49 partition of a 6.44-acre parcel located south of SW Roberts Road in unincorporated Clackamas County, Oregon ) **FINAL ORDER**  
) **Z0164-24-S Appeal**  
) **(Eager M49 Partition)**

**A. SUMMARY**

1. On April 22, 2024, Walter Eager on behalf of the Walter J. Eager Trust (the “applicant”) filed an application to partition a 6.44-acre property into three lots pursuant to State-approval of a Ballot Measure 49 claim (ORS 195.300 - 195.336), Election No. E130513- EAGER, permitting a modification of the lot sizing and dwelling criteria for the EFU zoning district. The property is located south of SW Roberts Road, roughly 1.25 miles east of SW Ladd Hill Road, known as tax lot 00801, Section 20, Township 3 South, Range 1 West of the Willamette Meridian (the “site”). The site and all surrounding properties are zoned EFU (Exclusive Farm Use). The site is a flag lot with an 865-foot long 30-foot wide flag pole providing access to SW Roberts Road from the “flag” portion of the site where the lots are proposed.

2. On July 11, 2024, the planning director issued a written decision approving the application subject to conditions. (Exhibit 1).

3. On July 23, 2024, Ben and Sandra Bole filed a written appeal of the planning director’s decision. (Exhibit 4). On the same date attorney Ty Wyman filed a separate appeal on behalf of William and Laurie Rumsey. (Exhibit 5). (Collectively the “appellants”).

4. Clackamas County Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed public hearing to receive testimony and evidence regarding the application. County staff summarized the director’s decision. The applicant appeared at the hearing in support of the application. Eight persons, including the appellants, Mr. Wyman, Mr. Wyman’s assistant, and three other persons, testified at the hearing in support of the appeal. The principal contested issues in the case include the following:

a. Whether the proposed parcels are “clustered” as required by Condition 11 of the M49 approval;

b. Whether the applicant owns the site as required by condition 12 of the DLCD decision approving the Measure 49 claim;

c. Whether the proposed wells can comply with setback requirements of the Code;

- d. Whether the application complies with the tree preservation requirements of ZDO 1002.03;
- e. Whether the site is within a fire hazard overlay and subject to ZDO 1003.05;
- f. Whether application complies with the water supply requirements of ZDO 1006.03;
- g. Whether the application complies with the subsurface sewage disposal requirements of ZDO 1006.05(A), specifically whether the applicant can utilize a shared drainfield;
- h. Whether it is feasible to comply with the sight distance requirements of Section 240.3(a) of the Clackamas County Roadway Standards at the intersection of SW Roberts and SW Ladd Hill Roads;
- i. Whether it is feasible to comply with the sight distance requirements of Section 250.2(a) of the Clackamas County Roadway Standards at the proposed site driveway intersection with SW Roberts Road;
- j. Whether it is feasible to comply with the access spacing requirements of Section 220.3 and Table 2-2 of the Clackamas County Roadway Standards at the proposed site driveway intersection with SW Roberts Road; and it is feasible to provide emergency access to the site.
- k. Whether it is feasible to provide emergency access to the site.

5. Based on the findings provided or incorporated herein, the hearings officer concludes the applicant failed to sustain its burden of proof that the proposed partition can comply with sight distance requirements at the intersection of SW Roberts and SW Ladd Hill Roads. Therefore the hearings officer grants the appeal, reverses the County's decision, and denies the application without prejudice.

## **B. HEARING AND RECORD**

1. The hearings officer received testimony at the public hearing about the appeal on August 22, 2024. All exhibits and records of testimony have been filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the statement required by ORS 197.763 and disclaimed any *ex parte* contacts, bias, or conflicts of interest. The following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planner Lizbeth Dance summarized the director's decision, the applicable approval criteria, and her PowerPoint presentation (Exhibit 13) and responded to the appeals.

a. She argued that the applicant “clustered” the proposed parcels to the extent feasible, as required by Condition 11 of the M49 approval. As proposed, Parcels 1 and 2 are two-acre parcels grouped together (clustered) in the northern portion of the flag portion of the site while the larger Parcel 3 is located at the south end of the site.

b. The tax assessor records for the site (Exhibit 3) demonstrate that the applicant, the Walter J. Eager Trust, is the owner of the site. The Eagers previously owned current tax lots 800 and 801. In 1995 the Eagers applied for a non-farm dwelling to separate tax lot 800 from 801 and allow construction of a residence on tax lot 800. Tax lot 801 is a legal lot of record owned by the applicant. Appellants Rumsey conceded that the deed enclosed with their appeal does not describe the site. (Exhibit 11a, Attachment D).

c. Although the site is forested, it is not considered a “significant cluster of trees” subject to ZDO 1002.03, as the site is zoned for farm use. The trees on the site were planted in rows similar to a Christmas tree farm in 1999. In addition, this standard does not apply to this partition application. The applicant is only required to demonstrate the availability of water, septic, and access. There are no “significant trees” on the site. County policy loosely defines significant trees in resource zones as trees that provide additional shading and characteristics for the site or surrounding properties. Heritage trees are typically those over 200 years old, however the ZDO no longer protects heritage trees.

d. The site is not within a fire hazard overlay. Therefore, the Fire Hazard Area criteria of ZDO 1003.05 are inapplicable. The applicant must obtain Fire District approval of the site access prior to final plat approval. Tualatin Valley Fire and Rescue (“TVFR”) concluded that the proposed partition can meet applicable fire access standards. (Exhibit 6).

e. The site is located within the Sherwood Wilsonville Groundwater Limited Area. The applicant submitted a hydrogeologic assessment prepared by a licensed professional (Exhibits 2a and 9), as required by ZDO 1006.03(E)(3) and that analysis was reviewed by an independent hydrogeologist hired by the County (Exhibits 2k and 7). The site is an existing lot of record. Therefore, one new exempt well is allowed outright. The hydrogeologic reviews determined that the two new home sites created by this partition will not create a significant draw on the aquifer. The applicants hydrogeologic review was specific to this site, reviewing all publicly available records for groundwater wells and development within a ¼-mile radius of the site as required by ZDO 1006.03(E)(3). The appellants submitted information about well deepening and development, but that information is not supported by any available data and relates to wells located outside of the required ¼-mile assessment area. The applicant’s hydrogeologist reviewed the appellant’s submittals, including the well deepenings and groundwater declines noted by neighbors, expanded their review to a one-mile radius, and reiterated their conclusion that the applicable approval criteria in ZDO 1006.03(E)(3)

are met. HBH Engineers' one paragraph statement regarding groundwater impacts of this development (Exhibit 11.c at 10) did not address the criteria in the Code.

f. It is feasible to provide adequate sight distance at the intersection of the proposed shared driveway and SW Roberts Road. The SW Roberts Road right-of-way is 40-feet wide and the applicant has a right to clear vegetation within the right-of-way as necessary to meet sight distance requirements. As noted in Exhibit 10, SW Ladd Hill Road has a posted advisory speed of 25 mph to the south and 35 mph to the north, approaching SW Roberts Road. Section 250.1.2(c)(2) requires the design speed to be determined based on the advisory speed plus 10 mph.

g. TVFR will review the site access and determine whether it meets applicable fire code requirements prior to final plat approval. The applicant is required to construct all emergency access improvements as outlined in Exhibit 6 prior to recording the final plat.

h. For this flagpole site, the applicant is required to provide a 25-foot wide access easement between SW Roberts Road and the access to proposed Lot 1, a 20-foot wide easement between the Lot 1 and Lot 2 accesses, and a 12-foot easement to Lot 3. 25 feet of easement width is sufficient to comply with emergency vehicle pullout requirements. Some type of emergency vehicle turnaround is also required at the end of the shared driveway. The applicant must construct the required access and turnaround consistent with the County Roadway standards prior to final plat.

i. Mr. Wyman submitted Exhibits 11a – c the day before the hearing. Exhibit 12 corrects typographical errors in the Staff Report.

j. The applicant provided septic approvals for each of the proposed lots. The applicant will be required to locate separate septic systems and drainfields on each individual lot.

k. Wells are exempt from setback requirements, so long as there is no structure higher than 30-inches.

3. Clackamas County development review coordinator Jonny Gish testified that property owners are required to maintain vegetation within the rights-of-way abutting their properties and on their properties outside the right-of-way as necessary to maintain adequate sight distance. County transportation engineering will reach out to adjacent property owners when there is a complaint about sight distance restrictions.

4. The applicant, Walter Eager, appeared at the hearing but did not offer additional testimony.

5. Attorney Ty Wyman appeared on behalf of appellants William and Laurie Rumsey. He requested the hearings officer hold the record open to allow the submittal of additional testimony and evidence.

a. The M49 approval allows the site to be divided into lots for three homes, subject to compliance with applicable code standards. In order to approve this application the hearings officer must find that such compliance is feasible, impose conditions of approval requiring actual compliance, and provide an opportunity for public notice and comment for any future discretionary decisions, citing *Rhine v. Multnomah County*.

b. The site and surrounding area are located in the rural area and zoned EFU. Groundwater, roads and infrastructure in the area are not planned or designed to support this type of small lot development.

c. The applicant has not demonstrated the feasibility of compliance with intersection sight distance (ISD) requirements at the intersection of SW Roberts Road and SW Ladd Hill Road. Currently sight distance at this intersection is restricted by vegetation and an embankment located on private property, outside of the public right-of-way. In addition, a restrictive covenant prohibits the removal of trees and vegetation on the private property abutting the intersection. Therefore, in order to approve this application the hearings officer must find that it is feasible to remove vegetation and grade the embankment on private property. There is no evidence that the County Code Enforcement section will act to require vegetation removal and grading on private property necessary to ensure adequate intersection sight distance.

d. The hydrogeologists for the applicant and the County are experts, but they do not live in, or have direct experience with, groundwater issues in this specific area. The reports include much data, but the actual experiences of existing residents has been different than determined in these reports. In *Phillips v. Lane County*, LUBA accepted a decision relying on lay testimony that conflicted with expert testimony regarding septic system feasibility.

6. Appellant William Rumsey expressed concerns with increase fire risk, traffic safety, and the availability of groundwater.

a. There were 1,700 fires in Oregon in 2023, which was considered a mild year. The 2020 Labor Day fire destroyed one million acres, 3,000 homes, and killed 11 people. The same year three fires broke out within two miles of their home which forced them to evacuate. In addition, a new house fire requiring fire fighter response occurs every three hours and 52 minutes, primarily due to cooking accidents. The nearest fire station in the area is three miles away in the City of Sherwood. The next nearest station is 11 miles away in Tigard. The Trover property, tax lot 705, located across Roberts Road from the site, has a 10,000 gallon water tank, but the tank is more than 900 feet away from the proposed homesites. Therefore, it is essential to provide adequate emergency access to the site to ensure that firefighters can quickly respond to fires on the site. He submitted a fire truck turning radius analysis from HBH Engineers (Exhibit 11.c at 10) demonstrating that the pavement on SW Roberts Road must be widened to provide emergency vehicle access to the site. Such road widening will require placement of fill

and removal of trees on the Trover property on the north side of the road and alterations to the existing vineyard on his property, tax lot 800 west of the site.

b. The existing pavement on SW Roberts Road is only 15 feet wide and does not allow for two-way traffic. SW Roberts Road currently serves eight homes, each with at least two cars. The proposed development will add three more homes, each of which is likely to have at least two cars. The proposed development will also generate additional school bus and delivery traffic on SW Roberts Road. This additional traffic will increase congestion, creating a hazard for existing residents in the event of future emergency evacuations. In addition, sight distance on SW Roberts Road is restricted by a curve of the road and vegetation near the Trover property which blocks the view of oncoming vehicles. Two vehicles have driven off the road in this location.

c. This development will create three new groundwater wells beginning 150 feet from their existing well which was drilled in 1996. The HGX report relied on data from Marion County rather than Clackamas or Yamhill Counties. A 1995-96 Parrett Mountain study noted that groundwater levels declined one foot per year over 14 years. Residents in this area already experience groundwater issues. Farah Ramchandani has two wells on her property on SW Ladd Hill Road less than two miles from the site, one of which runs dry in the summer, requiring her to have 3,000 gallons of water delivered by truck, and a second that has “water pressure problems” which indicates the probability of future failure. HGX cites to the limited numbers of well deepening or replacements in the area as evidence that groundwater is adequate. However, they fail to consider that many residents are on fixed incomes and cannot afford to deepen or renew their existing wells. In addition, deepening wells may result in saltwater contamination, which occurred on the Barker property on Roberts Road. Many of the neighbors’ wells are older and not cased, creating a risk of comingling of aquifers. HBH Engineers concluded that the three wells on this site will unreasonably interfere with and compromise their well, which is located much less than 1,000 feet from the proposed wells. Water levels in a well on the Drake property, located less than 150 feet from the site, declined eight feet since it was constructed in 1989.

7. Laurie Rumsey expressed concern with fire risk in the area, the distance to the nearest fire station, the lack of emergency water supplies, emergency access limitations created by the narrow pavement on SW Roberts Road, and congestion that occurs during evacuations. Fire trucks on SW Roberts Road will preclude residents from evacuating, as there is nowhere for vehicles to pass. The additional traffic generated by this development will also create a hazard, increasing the volume of traffic on this narrow road. Vehicles cannot pass each other and drivers must back up to a driveway to accommodate oncoming vehicles. The blind curve and drop off on SW Roberts Road create an additional hazard, especially for inexperienced teen age drivers.

8. Bill Boles testified that traffic safety is his primary concern and agreed with Mr. Rumseys’ testimony. He operates an orchard on Roberts Road that requires semi-trucks to transports product. Some residents do not back up well, causing congestion and delays.

9. Leann Bennett, president of Friends of Parrett Mountain, testified that she was involved in the water study conducted in 1994-95 when she and others went door to door to discuss water issues and measure water levels. The study was performed because a 66 lot subdivision was proposed on property zoned Ag/Forest. The subdivision was approved by mandamus, subject to a condition imposed by the Oregon Water Resources Division (“OWRD”) requiring the subdivision to cease use of the shared wells if water levels in neighboring groundwater wells declined. OWRD monitors five wells in the area and observed “significant water drop during that time.” OWRD has a shortage of staff, which limits its ability to monitor well levels. She argued that local testimony regarding water well levels is more relevant to the potential impacts of this development than the analyses by the consultants for the applicant and the County. Although the site is located in Clackamas County, it is within one mile of Yamhill and Washington Counties and all properties in this mountain area will be affected by groundwater withdrawals from this development. She noted that the proposed wells appear to be located within the required 20-foot front yard setback for the lots. Although the wells are underground, the wellheads may be subject to setback requirements.

10. Maggie Bielak, a paralegal with Mr. Wyman’s office, clarified Exhibit 11. Her declaration, Exhibit B of Mr. Wyman’s letter (Exhibit 11a) included four attachments: a deed for the McDonald land, a conservation easement between Kerman LLC and the Charles D. Trover Trust, a photo and text illustrating the vegetation restricting sight distance at the intersection of SW Roberts Road and SW Ladd Hill Road, and a letter from Mr. Trover.

11. Paul Welty and Eve Stevenson agreed with prior testimony regarding fire, groundwater, and traffic. Any vehicle that drives off of SW Roberts Road will end up in their backyard. There is no posted speed limit on SW Ladd Hill Road and many drivers exceed the basic rule speed of 55 mph. Traffic speeds increase the hazard created by the sight distance limitations at the SW Roberts Road intersection.

12. Beverly Trover agreed with prior testimony regarding fire, groundwater, and traffic. She noted that the applicant, Mr. Eager, drove off of SW Roberts Road in 1995 due to the lack of sight distance. There is a sheer drop off on the north side of this portion of SW Roberts Road. The vehicle took out a few trees and was stuck on the hillside until a tow truck could remove it. There is no shoulder on this road for vehicles to pull over. When opposing vehicles meet one must back up to a driveway to allow the other to pass. The three homes proposed on this site will add significant traffic to SW Roberts Road, increasing this hazard. SW Roberts Road is a dead end street, so an accident on this road could prevent residents from evacuating in the event of a fire or other emergency.

13. At the conclusion of the public hearing, the hearings officer held the record open for four weeks, subject to the following schedule:

a. For two weeks, until 4:00 p.m. on September 5, 2024, for all parties to submit additional testimony and evidence;

b. For an additional week, until 4:00 p.m. on September 12, 2024, for all parties to respond to the whatever was submitted during the first weeks; and

c. For a third week, until 4:00 p.m. on September 19, 2024, for the applicant to submit a final argument.

14. The following documents were submitted during the open record period.

a. Exhibit 17, maps and photos illustrating the intersection of SW Roberts and SW Ladd Hill Roads, submitted by the County;

b. Exhibit 18, appellants Rumseys' request to reopen the record dated September 16, 2024;

c. Exhibit 19, Hearings Officer Order to Reopen the Record dated September 17, 2024;

d. Exhibit 20, applicant's change of address and a letter from Pacific-Hydro-Geology Inc. dated September 19, 2024;

e. Exhibit 21, a letter from HGX dated September 18, 2024; and

f. Exhibit 22, a notice of closed record.

### **C. EVIDENTIARY ISSUES**

1. As noted above, the County and the applicant submitted new evidence during the second open record period. (Exhibits 17, 20, and 21). Appellants Rumseys requested the hearings officer reopen the record to respond to the new evidence. (Exhibit 18). As discussed in Exhibit 19, ORS 197.797(6)(c) requires the hearings officer to grant a request to reopen the record to respond to the new evidence. However, reopening the record in this case would prevent the County from issuing a final decision in this matter within 150 days from the date the application was deemed complete, as required by ORS 215.427. Therefore, the hearings officer reopened the record on the condition that the applicant extend the 150 day clock. The applicant did not agree to extend the clock. Therefore, the hearings officer must exclude Exhibits 17, 20, and 21 from the record, as all parties did not have the opportunity to respond to this new evidence.

### **C. DISCUSSION**

1. ZDO Table 1307-01 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), an appeal of an administrative decision is reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may



be introduced in an appeal, and new issues may be raised. The applicants must carry the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

2. Section 1105 of the ZDO sets forth the process, standards and requirements for a land use application for a Partition.
  - A. A Partition is defined as a division of property that creates three or fewer parcels in a calendar year and shall be processed as an administrative decision by the Planning Director, or designate, pursuant to subsection 1305.02. The proposed request is a partition to create three parcels. The applicant has submitted a complete application on County forms consistent with the requirements of ZDO Secs. 1105 and 1307.
  - B. Pursuant to Section 1105, partitions shall comply with the ZDO and Oregon Revised Statutes (ORS) Chapter 92. Compliance with the applicable provisions of the ZDO is discussed in the findings that follow. Compliance with County subdivision criteria and procedures will satisfy the relevant requirements of ORS 92 as well.
3. Section 401 of the ZDO sets forth the allowed uses, dimensional standards, and development requirements of the EFU zoning district. The use and development of the proposed lots is subject to Section 401 as they are located within the EFU zone.

**Finding:**

- A. *The applicant is proposing to divide the property into three parcels.*
- B. *Pursuant to Ballot Measure 49 claim, E130513- EAGER, the maximum number of parcels authorized is three with one permanent home site on each parcel is also authorized. Additionally, as the property is mapped as high value farm soils, the two of the three new parcels cannot exceed two acres with the remainder parcel, three parcels are proposed.*
- C. *The proposed partition plan is consistent with the Measure 49 claim requirements.*
  - i. *As required by condition 11 E130513- EAGER, the proposed homesites are “clustered so as to maximize suitability of the remnant ... parcel for farm use...” (Exhibit 2 at 73). Parcels 1 and 2 are the minimum size allowed and clustered together in the northern portion of the site, maximizing the size and suitability of the larger remainder parcel for farm use. (See Exhibit 2 at 34).*
  - ii. *Based on Clackamas County Assessor records, the applicant, the “claimant” for the Measure 49 claim, is the owner of the site as required by condition 12 E130513- EAGER. (Exhibit 3). Appellants Rumseys initially argued that the applicant is not the owner of the site, that Geoffrey Bingham, Trustee of the Geoffrey S. Bingham Revocable Trust, is the owner. (Exhibit 5 at 3). However, appellants Rumseys later determined*

*that the Bingham deed did not apply to the site. Therefore, they withdrew that portion of their appeal. (Exhibit 11a, Attachment D).*

- D. *As modified by the Measure 49 claim, the proposed partition complies with the parcel size requirements of the EFU zoning district.*
- E. *A condition of approval is warranted requiring that all structures on, and uses of, the parcels created by the proposed partition shall conform to the requirements of the zoning district subject to the provisions of Section 401 of the ZDO except as modified by the approved Measure 49 claim. Parcels 1 and 2 shall be no larger than two acres in size and future lot line adjustments increasing the size of these parcels is prohibited unless future changes in zoning render this limitation moot.*
- F. *Neighbors argued that the residential development proposed in this application is inconsistent with the purpose of the EFU zone and will conflict with existing agricultural uses. While the hearings officer understands those concerns, they are not relevant to the applicable approval criteria. As noted above, the proposed partition is allowed pursuant to Measure 49.*

*Based upon the information shown upon the preliminary plan, the proposed partition can comply with the minimum lot size criteria of the zone as modified by the Measure 49 claim. As **conditioned this criteria can be met.***

**ZDO 401** by reference 401 Dimensional Standards: Minimum front side and rear setbacks.

**Finding:** *Proposed Parcels 1, 2 and 3 are accessed by the 30-foot flag pole strip. The 30-foot access will be considered the front lot line for Parcels 1 and 2. Setbacks for the zone are 30 foot front, 10 foot sides, and 30 foot rear (home), 10 foot rear (detached accessory buildings) will be applied to all future development.*

*Pursuant to ZDO 903.06 structures, including underground structures, that extend no more than 30 inches above finished grade and are not covered are subject to a ten-foot front and rear yard setbacks and three foot side yard setbacks. Therefore, the hearings officer finds that it is feasible to locate groundwater wells in the front lots of the parcels as proposed. As **conditioned these standards can be met.***

- 4. Section 1001 of the ZDO sets forth the general provisions of the 1000 Sections that, taken together, set forth the general standards for development of property and associated facilities within the unincorporated area of Clackamas County.
  - A. Pursuant to Subsection 1001.02(A), the standards set forth in the 1000 Sections apply to all partition applications and approvals.

**Finding:** *As proposed these standards are met.*

- 5. Section 1002 of the ZDO sets forth the standards, requirements and considerations that pertain to the protection of the natural features of Clackamas County.

Section 1002.01 Hillsides A. Development on slopes greater than or equal to 20 percent and less than or equal to 35 percent—except that for residential development in the RR, MRR, and HR Districts, the upper limit is 25 percent—shall require review of a Type I application pursuant to Section 1307, Procedures, and shall be subject to the following standards:

1. No partition or subdivision shall create any new lot or parcel which cannot be developed under the provisions of Subsection 1002.01.

***Finding:*** *The property is slopes gradually to the south with slopes ranging from 6 to 11% throughout the majority of the property with a small area at the south of the property (base of the slope) with slopes over 20%. As proposed each parcel has a viable developable area outside of slopes over 20%. The top and toe of slope over 20% shall be identified on the face of the final plat as Restricted Development Area (RDA). As **conditioned this standards can be met.***

Section 1002.03 Trees and Wooded Areas

- A. Existing wooded areas, significant clumps or groves of trees and vegetation, consisting of conifers, oaks and large deciduous trees, shall be incorporated in the development plan wherever feasible. The preservation of these natural features shall be balanced with the needs of the development, but shall not preclude development of the subject property, or require a reduction in the number of lots or dwelling units that would otherwise be permitted. Site planning and design techniques which address incorporation of trees and wooded areas in the development plan include, but are not limited to, the following:

...

***Finding:*** *Staff argued that the tree preservation requirements of this section do not apply to this partition application. However, ZDO 1105.05(A) requires that partitions comply with Section 1000, Development Standards. Therefore, the hearings officer finds that the proposed development is subject to this provision as the site contains “Existing wooded areas ... or groves of trees and vegetation, consisting of conifers...” ZDO 1002.03(A). However, preservation of these wooded areas and groves must be balanced with the needs of the development and may not preclude the development or require a reduction in the number of lots that would otherwise be permitted. Id.*

*The hearings officer further finds that it is feasible to comply with the requirements of this section. The applicant must remove trees within the flag pole portion of the site in order to provide access and extend utilities to the to the proposed lots. No roads, parking lots, or “landscaped areas” are proposed. However, the applicant proposed to locate homes on the western portion of the lot, adjacent to the shared driveway, allowing the applicant to preserve existing trees on the remainder of the lots. The applicant is only required to preserve trees through final plat. Future residents may remove trees on their lots as*

*necessary for timber harvest, farming, and other uses permitted in the EFU district.*

ZDO 1105.05(A). The proposed subdivision, partition, or replat shall comply with the applicable provisions of the section of this Ordinance that regulates the subject zoning district and Section 1000, Development Standards.

6. Section 1003 of the ZDO pertains to hazards to safety such as landslides, soil hazards, and fire hazard areas. The intent of these standards is to protect lives and property from natural or man-induced hazards and disasters.

***Finding:*** *There are no mapped DOGAMI or other hazard areas on the property and, based on Ms. Dance's unrebutted testimony, the site is not within a fire hazard overlay. Neighbors' concerns about increased fire risks and , while not unreasonable, are not relevant to the applicable approval criteria. Almost any development will increase the risk of fire, but there is no evidence in the record that the development proposed on this site will create an unusual risk or that the site and surrounding area have a higher risk of fire than similar areas of the County. The appellants and other area residents expressed concerns that the additional traffic generated by this development on SW Roberts Road will limit other residents ability to evacuate in the event of a wildfire or other emergency. While the hearings officer understands those concerns, they are not relevant to the applicable approval criteria for this application.*

7. Section 1006 of the ZDO sets forth the standards, requirements, and considerations that pertain to water supply, sanitary sewer, surface water, and utilities services concurrency.

A. Pursuant to Subsection 1006.01(A), the location, design, installation, and maintenance of all utility lines and facilities shall be carried out with minimum feasible disturbance of soil and site consistent with the rules and regulations of the surface water management regulatory authority.

***Finding:*** *Based upon the preliminary plans and other information submitted with this application, the staff of these reviewing bodies have determined that it is feasible to comply with the requirements of this section. As **conditioned this criterion can be met.***

B. Pursuant to Subsection 1006.01(B) all development that has a need for electricity, natural gas, and communications services shall install them pursuant to the requirements of the utility district or company serving the development. Except where otherwise prohibited by the utility district or company, all such facilities shall be installed underground. A condition of approval to this effect is warranted.

***Finding:*** *The applicant states that all electric, gas and communication services will be installed underground pursuant to the requirements of the applicable district or company. As **conditioned this criterion can be met.***

- C. Coordinated installation of necessary water, sanitary sewer, and surface water management and conveyance facilities is required.

***Finding:*** *Construction/installation of utilities will be coordinated. Each individual parcel will have septic systems and wells installed in areas approved by the County. Septic systems, including individual drainfields, will be installed with building permits for Parcels 1, 2 and 3. All runoff from the site will sheet flow and eventually infiltrate. The future homesites should be graded to provide positive drainage away from their foundations, and the downspouts from roof runoff can drain to the ground surface, directed away from the homes, allowing the runoff to infiltrate into the ground. Specific runoff for future homes will be further addressed at the time of the building permits. Clackamas County is the surface water management authority for the area including the subject site. The proposal must be in conformance with Chapter 4 of the Clackamas County Roadway Standards. Positive drainage must be provided to an existing storm drainage system capable of accommodating the estimated contribution. As conditioned this criterion can be met.*

- D. Easements shall be provided along lot lines as deemed necessary by the County, special districts, and utility companies. Easements for special purpose uses shall be of a width deemed appropriate by the responsible agency.

***Finding:*** *Proposed Parcels 1, 2, and 3 will take access from SW Roberts Road via an approximately 865 foot long, 30-foot wide flag pole strip of the property. This access will serve three properties. See advisory notes for Road Naming requirements. Conditions of approval will be imposed to assure compliance with these standards.*

- E. Pursuant to Subsection 1006.02, street lights shall be required for all developments inside the urban growth boundary, as outlined under this Subsection.

***Finding:*** *The site is not located within the Portland Metropolitan Urban Growth Boundary. This criterion is not applicable.*

- F. Water Supply: Pursuant to Subsection 1006.03 specifies the requirements for water supply outside the Portland Metropolitan Urban Growth Boundary.

- G. Applicants shall specify a lawful water source for the proposed development, such as a public or community water system, certificated water right, or exempt-use well.

***Finding:*** *Parcels 1 and 2 are within the Sherwood Wilsonville Ground Water Limited Area. Proposed, Parcels 1, 2, and 3 will use exempt-use wells. Groundwater is available from the Columbia River Basalt Group aquifer to support this partition as outlined in the HGX Solutions LLC Hydrogeologic Assessment project Walt Eager dated February 7, 2024 (Exhibit 2a), and supported in the GSI Peer review dated July 1, 2024 (Exhibit 2k), as amended by Exhibits 7, 9, and 21. The HGX report followed the analysis criteria set out*

*in ZDO 1006.03(E)(2) and (3) and it was subject to peer review as required by ZDO 1006.03(E)(4).*

H. 1006.03(E)(2): All subdivisions proposing to use an exempt-use well or wells and all land divisions, and new industrial, commercial, or institutional development located within a sensitive groundwater area and proposing to use an exempt use well or wells must affirmatively demonstrate that:

- i. The subject aquifer is capable of sustaining the proposed development with sufficient potable water.
- ii. The proposed development is not likely to unreasonably interfere with existing wells. Unreasonably interfere means that a proposed development will result in one or more senior groundwater appropriators being unable to obtain either the permitted or the customary quantity of groundwater, whichever is less, from a reasonably efficient well that fully penetrates the aquifer where the aquifer is relatively uniformly permeable. However, in aquifers where flow is predominantly through fractures, full penetration may not be required as a condition of finding substantial or undue interference.
- iii. The proposed development is not likely to contribute to the overdraft of the affected aquifer.

***Finding:*** *As outlined in GSI's peer review of the provided HGX Solutions LLC Hydrogeologic Assessment project Walt Eager, February 7, 2024, the following conclusions were made:*

*The Hydrogeologic Review sufficiently demonstrates that, based on the methods in the ZDO, groundwater is available from the Columbia River Basalt Group aquifer to supply the proposed development. Specifically, the water budget calculations (which are based on conservative assumptions) indicate a demand to recharge ratio of approximately 35% (indicating groundwater is available to support the proposed development), and the water budget's finding is supported by the facts that: (1) groundwater level hydrographs indicate current water level trends in the Columbia River Basalt Group aquifer are rebounding since 2002 and are now stable, and (2) well deepening in the study area are not excessive (approximately 4% of all wells, less than the 12.5% criteria that may indicate an overdraft condition). Lastly, GSI agrees with the Hydrogeologic Review's determination that potential well interference from the new wells will not impair existing water users. The new wells, however, should be adequately spaced and constructed to limit interference drawdown effects on adjacent wells to the extent possible."*

(Exhibit 2k at 6).

*The appellants and other neighbors disputed the findings of the HGX report and GSI's peer review. However, they failed to provide any site specific evidence (well logs, well depths and water level data, etc.) to support their claims. Neighbors noted adverse impacts from co-mingling of aquifers. However, OAR 690-200-0043 requires that new wells be constructed to preclude such comingling. Opponents argued that there have been few well deepening in this area because some residents are on fixed incomes and cannot afford the cost of extending their wells. However, there is no evidence that there a higher proportion of residents with fixed incomes in this area than elsewhere. Opponents argue that the Marion County study noted in the HGX report is not persuasive, because Marion County is a considerable distance from the site. However, that study was primarily cited as a basis for determining when the well deepening rate may indicate that groundwater demand is exceeding groundwater availability. The hearings officer finds that neighbors' unsupported subjective testimony, although based on their personal experiences and observations, are not sufficient to overcome the expert testimony of the geologists for the applicant and the County, which are based on cited data and analysis of existing wells in the area and prior studies of groundwater in the area.*

*Appellants Rumseys submitted a memorandum from HBH engineering stating that they "believe" the wells proposed on the site will unreasonably interfere with and compromise the Rumseys' well on tax lot 800. (Exhibit 11.c at 10). However, they failed to provide any discussion or analysis to support this conclusion. The hearings officer finds that the HGX report, as confirmed by the GSI peer review, both of which were prepared by Oregon licensed geologists and based on extensive analysis of cited data and prior studies is more persuasive than the unsubstantiated conclusion in the HBH memo.*

*The fact that other wells in the area hit a layer of salt water is irrelevant. If that occurs the driller can seal that portion of the well to prevent salt water intrusion into other aquifers. That is what occurred for the well cited by neighbors. (Exhibit 14). Although that remedy is expensive, it is feasible to do so if it occurs.*

***As conditions these criteria can be met.***

- I. ZDO 1006.05(A): All development proposing subsurface sewage disposal shall receive approval for the system from the County prior to submittal of a land use application for development. Said systems shall be installed pursuant to Oregon Revised Statutes 454.605 through 454.745 and Chapters 171, 523, and 828; Oregon Administrative Rules Chapter 340, Divisions 71 and 73; and the policies of the County.

***Finding:*** *The parcels created by this proposed land division will be served by subsurface sewage disposal (more properly called onsite wastewater treatment systems). Under the relevant statutes and administrative rules, approval of a new onsite wastewater treatment system requires an approved site evaluation. The site evaluation details the requirements for construction of the future systems and*

established systems. The applicant has submitted an approved site evaluation for systems serving single-family dwellings on established Parcel 1 and proposed Parcels 2 and 3. See files SE000723, SE000823 and SE000923. These records demonstrate that the approved area for installation of each onsite wastewater treatment system is contained within the proposed lot lines for the parcel that the system will serve. The shared drainfield shown on the site plan (Exhibit 2 at 34) is not permitted. Conditions of approval will require that prior to final plat approval the applicant shall submit a site plan sufficient to verify the location of each onsite wastewater treatment system approval area, and each existing system proposed to remain in use, relative to the new lot lines, as well as any necessary easement documents if system locations prove to be outside the boundaries of the lots they will serve. Installation of the future system(s) must comply with the statutes and administrative rules cited above and administered by the Clackamas County Onsite Wastewater Program. Conditions of approval will require such compliance.

J. 1006.07- Preliminary Statement of Feasibility

**Finding:** All Statements of Feasibility, On Site Surface Water Management and Septic - were provided with the submittal of this partition request.

## 7. ZDO SECTION 1007 ROADS AND CONNECTIVITY

### 1007.01 GENERAL PROVISIONS

- A. The location, alignment, design, grade, width, and capacity of all roads shall be planned, coordinated, and controlled by the Department of Transportation and Development and shall conform to Section 1007, Chapters 5 and 10 of the Comprehensive Plan, and the Clackamas County Roadway Standards. Where conflicts occur between Section 1007, the Comprehensive Plan, and the Clackamas County Roadway Standards, the Comprehensive Plan shall control.

**Finding:** The applicant has filed a development application for a three-lot partition of a 6.44 acre property located south of SW Roberts Road

- B. Right-of-way dedications and improvements shall be required of all new developments, including partitions, subdivisions, multifamily dwellings, two- and three-family dwellings, condominiums, single-family dwellings, and commercial, industrial, and institutional uses, as deemed necessary by the Department of Transportation and Development and consistent with Section 1007, Chapters 5 and 10 of the Comprehensive Plan, and the Clackamas County Roadway Standards.

**Finding** The proposed development has approximately 30-feet of frontage along SW Roberts Road, which is classified on Clackamas County Plan Map 5-4b as a rural local road. SW Roberts Road has an existing right-of-way width of 40-feet. No right-of-way dedication will be required. **This criteria can be met.**



1007.02 PUBLIC AND PRIVATE ROADWAYS

C. All roadways shall be developed according to the classifications, guidelines, tables, figures, and maps in Chapters 5 and 10 of the Comprehensive Plan and the provisions of the Clackamas County Roadway Standards.

1. Development along streets with specific design standards specified in Chapter 10 of the Comprehensive Plan shall improve those streets as shown in Chapter 10.

***Finding:*** *The applicant is not proposing any new public roads. The applicant has submitted a site plan showing a new shared road accessing SW Roberts Road. The applicant will be required to provide a new access point meeting minimum requirements of standard detail D500.*

*There is no dispute that SW Roberts Road is not improved to current standards. The existing pavement averages roughly 15 feet wide, which limits the ability for opposing vehicles to pass each other and requires that drivers back up to a wider road section of driveway in order to pass. In addition, sharp curves and vegetation limit views of oncoming vehicles in some locations and there are steep slopes adjacent to the roadway. However, these are existing conditions that the applicant cannot be required to remedy. This is an existing County road and the Code does not impose minimum pavement width requirements for roads providing access to a development. The need for wider pavement on this roadway is a need to which all properties served by SW Roberts Road contribute, not just the lots being created in this case. There is no evidence of a substantial number of accidents or other evidence that these conditions create a significant hazard. These conditions are obvious and reasonably prudent drivers will slow down to accommodate these road conditions. Unfortunately not all drivers are prudent enough to observe posted speed limits and road conditions. However there is no evidence that the development proposed in this application will contribute a disproportionate share of imprudent drivers.*

***This criteria can be met.***

D. Developments shall comply with the intersection sight distance and roadside clear zone standards of the Clackamas County Roadway Standards.

***Finding:*** *Section 240.3(a) of the Clackamas County Roadway Standards requires proposed developments that add a minimum of 15 daily trips to off-site intersections with inadequate ISD may be required to mitigate that intersection along at least one route from the site access to the nearest collector or arterial roadway per 240.2 or be denied access.*

*SW Ladd Hill has an advisory speed of 25 mph to the south and 35 mph to the north. Section 250.1.2(c)(2) requires the design speed to be determined as the advisory speed plus 10 mph. Therefore, Table 2-6 requires a minimum of 390-foot southbound and 500-foot northbound of ISD is required at the intersection of SW Ladd Hill and SW Roberts Road.*

*Engineering staff visited the site and measured the ISD to be 210-feet to the south and 560-feet to the north along SW Ladd Hill Road. The northbound IDS exceeds the requirement of 500-feet. However, the southbound ISD is blocked by vegetation and the embankment and therefore is insufficient.*

*The director's decision includes a condition requiring the applicant provide and maintain the minimum required ISD at the intersection of SW Ladd Hill Road and SW Roberts Road. However, there is no evidence in the record that it is feasible to do so. The applicant may perform grading and clearing within the public right-of-way as necessary to meet sight distance requirements. However, Appellants Rumseys testified that the vegetation and embankment are located on private property, outside of the right-of-way. (Exhibit 16c). There is no substantial evidence in the record to the contrary. The applicant has no right to clear and grade private property.*

*Section 7.03.090(B) provides, in relevant part "No person shall allow any of the following things to exist on ... property they own or occupy... that abuts a road... if the thing obstructs the view necessary for safe operation of motor vehicles upon the road... 4. Any vegetation...9. Natural or man-made objects." Therefore, the County could bring an enforcement action to require that the abutting property owner clear and grade their property as necessary to comply with intersection sight distance requirements. The fact that the abutting property is subject to a private conservation easement is irrelevant, as the easement does not override public safety. However, there is no evidence in the record that the County is likely to take this action in order to facilitate the proposed private development. Therefore, the hearings officer cannot find that it is feasible to comply with the sight distance requirements of Section 240.3(a) of the Clackamas County Roadway Standards.*

*It may be feasible for the applicant to meet sight distance requirements at this intersection if the vegetation and embankment that currently limit sight distance at this intersection are located within the right-of-way. The applicant can easily determine this by surveying the intersection to determine the location of these sight distance restrictions in relation to the right-of-way. Therefore the examiner denies the application without prejudice so the applicant can re-apply if he determines that it is feasible to meet sight distance requirements.*

***This criteria is NOT met.***

*Section 250.2(d) allows sight distance at accesses to very low volume local roadways to meet eligibility requirements of Table 2-9. There are no current traffic counts on SW Roberts Road, however the subject tax lot is located at the very end of the roadway. Therefore, the new private road is subject to Table 2-9. The new private road entrance will be required to provide a minimum of 115-feet of intersection sight distance. County engineering staff measured sight distance along SW Robert Road in excess of 265-feet to the east and in excess of 500-feet to the west. (Exhibit 10 at 3). The applicant will be required to maintain sight distance over time. **As conditioned this criteria can be met.***

1007.03 PRIVATE ROADS AND ACCESS DRIVES

- E. Private roads and access drives shall be developed according to classifications and guidelines listed in Section 1007, Comprehensive Plan Figures 5-1 through 5-3, *Typical Roadway Cross Sections*, Chapters 5 and 10 of the Comprehensive Plan, and the Clackamas County Roadway Standards...:

***Finding:*** *The applicant has submitted a preliminary plat showing all three lots accessing a shared easement leading to SW Roberts Road. The applicant will be required to provide a 12-foot wide road centered within a minimum 20-foot easement. The roadway surface, width and structural section will be required to meet minimum requirements set forth in standard detail R100. As **conditioned this criteria can be met.***

1. The intersection of private roads or access drives with a public or county road and intersections of two private roads or access drives shall comply with the sight distance and clear zone standards pursuant to Subsection 1007.02(D).

***Finding:*** *SW Roberts Road does not have a posted speed limit, however, Section 250.1.2 requires a minimum of 25 mph. Therefore the applicant is required to provide a minimum of 115-feet of intersection sight distance for a very low volume local road per Table 2-9. As noted above, County engineering staff measured sight distance along SW Robert Road in excess of 265-feet to the east and in excess of 500-feet to the west. (Exhibit 10 at 3). **This criteria is met.***

2. Section 220.3 and Table 2-2 of the Clackamas County Roadway Standards requires a minimum of 25 feet of access spacing along rural local roadways. Access spacing shall consider accesses along both sides of the roadway (i.e. spacing from existing accesses on the north side of a road when an access on the south side of the road is proposed). Access spacing shall be measured from the proposed centerline to the centerline of an existing access or roadway or planned roadway.

***Finding:*** *The access for the proposed development is limited to the 30-foot frontage along SW Roberts Road. There are two existing accesses along the south side of SW Roberts Road: a temporary agricultural access to the west, the centerline of which is located approximately 20 feet from the center of the flagpole, and a residential access to the east located approximately 65-feet from the center of the flagpole. (Exhibit 10 at 2). Engineer staff determined that the applicant can meet the required access spacing standard by aligning the proposed private road along the easterly property line. This alignment would also provide additional turning radius for emergency vehicle access. As **conditioned this criteria can be met.***

1007.07 TRANSPORTATION FACILITIES CONCURRENCY

- F. Subsection 1007.07 shall apply to the following development applications: design review, subdivisions, partitions, and conditional uses.

1. Approval of a development shall be granted only if the capacity of transportation facilities is adequate or will be made adequate in a timely manner. The following shall be exempt from this requirement:

***Finding:*** Per ZDO subsection 1007.07, adequate roadway capacity is required to handle the additional traffic generated by the development. At the present time, SW Roberts Road operates during the mid-day one hour peak and first and second hours of the PM peaks at acceptable volume to capacity (v/c) ratios. The additional vehicle trips from the proposed partition will not adversely impact the current v/c ratios. Therefore, the County's concurrency requirements as they relate to the transportation system are met by the applicant's proposal. ***This criteria is met.***

## 8. EMERGENCY ACCESS.

- A. Section 230.7(a) of the Clackamas County Roadway Standards provides "All residential and agricultural driveways longer than 150 feet in length shall be designed to provide for fire access and shall be provided with an emergency vehicle turnaround area at or near the driveway termination."

***Finding:*** The hearings officer finds that it is feasible to provide emergency access to the site. HBH Engineers noted that improvements necessary to comply with Fire Code turning radius requirements may negatively impact several trees located north of the existing pavement on SW Roberts Road and "compromis[e]" the Rumseys' vineyard located east of the flag pole portion of the site. (Exhibit 11c at 10-11). However, the existing right-of-way on SW Roberts Road is 40 feet wide. (Exhibits 2j at 5 and 11c at 11). Therefore, it is feasible for the applicant to remove trees and widen the pavement, if necessary, without impacting adjacent properties.

HBH Engineers did not indicate how grading of the proposed driveway entrance will impact the Rumseys' vineyard. Standard Details D500 and R100 of the Clackamas County Roadway Standards require a minimum 12-foot wide gravel surfaced roadway within a 20-foot easement. The existing 30-foot wide flagpole portion of the site is wide enough to accommodate these improvements. Based on the turning radius diagram provided by HBH Engineers, the fire truck turning radius can be accommodated entirely within the existing right-of-way and the 30-foot wide flag pole portion of the site. The eastern edge of the turning radius is 1.9 feet west of the Rumseys' property line. Therefore, it appears feasible to provide emergency access to the site without impacting the Rumseys' property.

In addition, the applicant has a 20-foot wide easement on the western portion of the Rumsey property, recorded under Number 96-028970. Therefore, the applicant has a right to construct additional driveway improvements on the Rumseys' property. (Exhibit 8 at 3). The Rumseys argue that the easement is invalid or insufficient. (Exhibit 11a at 2). However, the easement is not included in the record and examiner has no authority to interpret the scope of the easement. There is an easement. Therefore, the examiner must find that the applicant has a right to use that easement for access to the site. The fact that the Rumseys have constructed improvements

*within the easement area is irrelevant. As the owners of the servient estate the Rumseys have no right to preclude use of the easement for its stated purpose. Clark v. Kuhn, 171 Or.App. 29, 33, 15 P.3d 37 (2000) (the servient estate owner retains the right to use the land in any way he or she wants as long as the use does not unreasonably interfere with the easement holder's use).*

*The Fire District will ensure compliance with the access and other applicable requirements of the Fire Code through the final review process. (See condition 3.b of the director's decision). In addition, the Fire District can approve alternative fire suppression methods where access is limited, i.e., sprinklers connected to water storage tank (OFC 503.1.1 cited in Exhibit 6) or other options allowed by Fire Code. Therefore the hearings officer finds that it is feasible to comply with Fire Code access requirements.*

#### **D. CONCLUSION**

Based on the above findings and discussion, the hearings officer concludes that the applicant failed to carry the burden of proof that the proposed partition can comply with sight distance requirements at the intersection of SW Roberts and SW Ladd Hill Roads. Therefore the appeal should be granted, the director's decision should be reversed, and the application should be denied without prejudice for the reasons provided herein.

#### **E. DECISION**

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby grants the appeal, reverses the County's decision, and denies Z0164-24-S (Eager M49 Partition Appeal) without prejudice.

DATED this 3rd day of October 2024.



Joe Turner, Esq., AICP  
Clackamas County Land Use Hearings Officer