

BEFORE THE KLAMATH COUNTY BOARD OF COMMISSIONERS

In the Matter of:)

Conditional Use Appeal 34-91)
for Brooks/Buehler on LUBA)
REMAND)

ORDER

THIS MATTER came before the Board of Commissioners on April 8, 1992 for hearing on remand, following issuance of a final opinion and order in the cause entitled "Andrew Silani, Lord Maitreya and Robert Woldt, Petitioners v. Klamath County, John Brooks, Lauralee Brooks and William Buehler, Intervenors/Respondent, LUBA No. 91-140". Petitioners (hereinafter referred to as Appellants) Andrew Silani, Lord Maitreya and Robert Woldt were present. Respondents, John Brooks, Lauralee Brooks and William Buehler were present and represented by their counsel Bradford J. Aspell. Carl Shuck, Klamath Planning Director appeared for and on behalf of Klamath County. The hearing was recorded by Karen Berg. Appellants seek reversal of the opinion and order dated September 4, 1991 entered by this Board upholding the decision of the Klamath County Planning Director for the issuance of CUP 34-91 (with conditions) authorizing operation of a family restaurant in a neighborhood commercial (CN) zone under Klamath County Land Development Code (hereinafter LDC) 52.210.

1. Testimony and evidence were received on April 8, 1992. The record on review was held open until April 17, 1992 and an oral decision was rendered on May 6, 1992.

2. The Land Use Board of Appeals remanded the earlier decision to address the following issues:

A. Whether Conditional Use Permit Application 34-91 identified as a "restaurant" is substantially identical to the prior application for a "tavern", which application was denied in CUP 23-91, which would preclude reapplication under LDC 44.040(F) for one year.

B. Whether there is evidence in the record of CUP 23-91 addressing the livability standards set forth in the Conditional Use Permit criteria found at LDC 44.030(C), and if so, whether substantial impact would result from approval of the request.

3. The scope of this appeal is limited to the issues raised above. In order to apprise the parties of the scope of appeal, the Board issued letters dated March 10, 1992; March 24, 1992 and April 15, 1992.

4. During the hearing, issues relating to admissability of evidence again arose. The appellants sought to introduce the two 90-minute tape recordings of the testimony of CUP 23-91. The Board cited to appellants the following provisions of LDC 31.130:

"The secretary to the review body or his/her authorized representative shall be present at each hearing and shall cause the proceedings to be recorded.

A. Testimony shall be transcribed if required for an appeal, if requested by the review body, or if requested and paid for by any other party.

B. The review body shall, where practicable, retain as part of the hearing record each item of physical or documentary evidence presented and shall have the items marked to show the identity of the person of-

fering the same and whether presented on behalf of a proponent or opponent. Exhibits received into evidence shall be retained in the hearing file until after the applicable appeal period has expired, at which time the exhibits may be released to the person identified thereon, or otherwise disposed of.

- C. The final order shall be included in the record.
- D. Any person shall have access to the record of the proceedings at reasonable times, places and circumstances. A person shall be entitled to obtain copies of the record for a reasonable costs."

5. On April 8, 1992, the Board allowed Appellants to and including April 15, 1992 to cause the record to be transcribed and filed. Appellants declined to submit a transcription, but offered the cassette tapes for inclusion. In response to appellants offer of the tapes, the Board, by letter dated and hand delivered April 15, 1992, gave appellants an additional two days to April 17, 1992 to submit a transcript. While the tape recordings are a part of the record, they have not been reviewed by the governing body in issuing its decision. The Board finds that to require it to listen to more than three hours of tape recorded testimony would cause undue burden and hardship upon the governing body. Appellants were given every opportunity to submit for the record, testimony in useable form, which they failed to do.

6. Appellants offered a portion of the record of CUP 23-91 including the letter of James D. Bocchi (Ex 1); letter of Park Place Real Estate (Ex 2); letter of letter of Roland Tutor (Ex 3); map showing location of appellant Andrew Silani's property (Ex 4); December 15, 1991 Herald & News article reporting on Chicken and Cheers (Ex 5); Conditional Use Permit 23-91 opinion and order of

ORDER ON REMAND - PAGE 3

hearings officer Neal D. Smith, dated May 17, 1991 (Ex 6); petition of Robert and Gladys Woldt, dated 04-22-91 (Ex 7); letter of James L. Pratt, dated 04-19-91 (Ex 8); letter of James Toddy, dated 04-07-91 (Ex 8 Continued); letter of Earl Robert Woldt, dated 04-22-91 (Ex 8 Continued); letter of Robert Woldt explaining petition opposing tavern, dated 04-22-91 (Ex 8 Continued); letter of David J. Davis, dated 04-21-91 (Ex 9); letter of Ferguson School Teachers, undated (Ex 9 Continued); letter of Lord Maitreya, undated (Ex 9 Continued); letter of Mike and Kristi Redd, dated 04-10-91 (Ex 9 Continued); petition in opposition to liquor license, dated 04-19-91 (Ex 9 Continued); letter of Ted and Alta Dickinson, dated 04-02-91 (Ex 9 Continued); letter of Michael J. Poole, dated 05-12-91 (Ex 9 Continued); letter of Shannon D. Harlan, dated 04-02-91 (Ex 9 Continued); letter of John and Patsey Mathes, dated 04-14-91 (Ex 9 Continued); letter of Dick and Cindy Nellipowitz, undated (Ex 9 Continued); letter of Richard H. Tackas, dated 04-04-91 (Ex 9 Continued); letter of Jean Phillips, dated 04-04-91 (Ex 9 Continued); letter of Dave Gibbons, dated 04-08-91 (Ex 9 Continued); letter of Mr. and Mrs. Blevans, dated 04-09-91 (Ex 9 Continued); letter of Don and Jean Thomas, dated 04-05-91 (Ex 9 Continued); letter of Betty J. Bragg, dated 04-22-91 (Ex 9 Continued); letter of Winona and Tim Gregory, dated 04-04-91 (Ex 9 Continued); letter of Tom and Helen Gorden, dated 03-26-91 (Ex 9 Continued); letter of Mr. and Mrs. Charles Compton, dated 04-03-91 (Ex 9 Continued); letter of Margaret Carver, dated 04-09-91 (Ex 9 Continued); letter of Sarah Tackas, dated 04-04-91 (Ex 9 Continued); letter of Debra S. Hagen,

dated 04-04-91 (Ex 9 Continued); letter of Mr. Clark, undated (Ex 9 Continued); letter of Nancy Roder, dated 04-23-91 (Ex 9 Continued); letter of Mr. and Mrs. Leahy, dated 04-07-91 (Ex 9 Continued); letter of Sharon Harper, undated (Ex 9 Continued); letter of Carol McCullough, dated 04-04-91 (Ex 9 Continued); letter of Eldon and Muriel Stonebury, dated 04-05-91 (Ex 9 Continued); letter of Mary Daniels, dated 04-06-91 (Ex 9 Continued); letter of Mary L. and Donald M. Peterson, dated 04-11-91 (Ex 9 Continued); letter of Charlene Mogel, undated (Ex 9 Continued); letter of Georgina L. and Donald Gelhardt, dated 04-05-91 (Ex 9 Continued); letter of Pamela Orr, undated (Ex 9 Continued); letter of Homer and Addie Johnston, dated 04-10-91 (Ex 9 Continued); letter of Major and Mary Toney, undated (Ex 9 Continued); letter of Deanna L. Vest, undated (Ex 9 Continued); letter of Florence Norberry, dated 04-04-91 (Ex 9 Continued); letter of Matt Strand, dated 04-04-91 (Ex 9 Continued); letter of Mr. and Mrs. M. E. Keifer, undated (Ex 9 Continued); letter of Mr. F. W. Dassler, dated 03-04-91 (Ex 9 Continued); letter of Bernice and Asmud Helferg, dated 04-04-91 (Ex 9 Continued); letter Mrs. Franke, undated (Ex 9 Continued); letter of John and Emma Toffell, dated 04-03-91 (Ex 9 Continued); letter of Beverly Hanson, dated 04-18-91 (Ex 9 Continued); letter of Wanda and Walker Turlington, dated 04-03-91 (Ex 9 Continued); letter of Robert and Kay Salley, dated 04-10-91 (Ex 9 Continued); letter of Joe and Carolyn Taylor, dated 04-15-91 (Ex 9 Continued); letter of Dennis and Sharon Clark, dated 04-05-91 (Ex 9 Continued); and letter of Debra Fredricks, dated 04-04-91 (Ex 9 Continued).

7. The Board has considered the entire written record of CUP 23-91 which includes Klamath County Exhibits: Exhibit "A" (Staff Report); Exhibit "B" (Location Map); Exhibit "C" (Letter from City of Klamath Falls Planning Director); Exhibit "D" (Site Plan); Exhibit "E" (Memo to File from Mark Richards); Exhibit "F" (Letters in Opposition to Application [57]); Exhibit "G" (Letters in Favor of Application [14]); Exhibit "H" (Photographs [2]); Exhibit "I" (Letter from Klamath County Fire District No. 1); Exhibit "J" (Letter from Oregon Liquor Control Commission); Exhibit "K" (Children's Count from Site); Exhibit "L" (City Map Showing Location from which Letters in Opposition and in Favor Originated); Exhibit "M" (Revised Site Plans); Exhibit "N" (Letter from Lord Maitreya); and Exhibit "O" (Newspaper Clipping Showing Advertisement).

8. At hearing, the Board received the supplemental staff report; testimony of Andrew Silani, Robert Woldt and Lord Maitreya; seven photographs of the subject site of the restaurant exterior and surrounding area; list of published closing hours submitted by Robert Woldt (no exhibit number given); list of 55 residents within the immediate geographical area who support the restaurant (Ex 10); copy of the current menu of the restaurant (Ex 11); Oregon Administrative Rules 845-06-032 (Ex 12); preliminary list of menu items for tavern (Ex 13); list of children who patronize the restaurant (Ex 14); site plan of the restaurant (Ex 15); and a list of patrons to the restaurant with comments, approximately 17 pages (Exhibit 10).

9. The Board has received into evidence the record of CUP 22-91 and CUP 34-91, including all written testimony, exhibits, staff reports, findings and orders and has read the entire record.

10. The Board further left the record open for seven (7) days pursuant to ORS 197.763(6) for submission of the transcript and for submission of requested findings. No additional submissions were made, except the letter of Lord Maitreya, dated April 15, 1992, attached to copies of the tape recording.

11. Having considered the record of CUP 23-91, CUP 34-91, the testimonial evidence and arguments of appellants and respondents, the Board makes the following Findings of Fact.

FINDINGS OF FACT:

1. Respondents' prior application, CUP 23-91 was for a "tavern" which was denied by hearings officer Neal D. Smith. The present application is for a "restaurant". The Board finds that while labels may be illustrative, they are not determinative. The analysis must be, are the uses "substantially identical"?

"Substantially" as defined by Black's Law Dictionary, Fourth Edition, is:

"(E) Essentially; without material qualification; in the main, in substance . . .".

"Identical" as defined in Webster's II, New Riverside University Dictionary means:

"being the same; exactly equal and alike; having such similarity or near resemblance as to be fundamentally equal or interchangeable . . .".

In making such determination, the Board must consider differences in:

- A. The physical layout and amenities between the two intended uses;
- B. Intended and actual patronage;
- C. The scope and extent of food service;
- D. Employment patterns;
- E. Hours of operation; and
- F. Neighborhood perceptions.

2. A. Physical Layout. The facility was a pre-existing, abandoned convenience store. While the outside dimensions were thus pre-established, it is clear from the review of the plans submitted with the tavern application (Ex 15) and plans submitted with the restaurant application (Ex D), that the interior space has been significantly reconfigured. With the tavern, the facility was to have a number of pool tables. The tavern application would have created one large room and no dining area. The present facility has a family restaurant area and a separate adult area. The mere posting of an "adult only" area does not disqualify the facility as being a restaurant, anymore than does a pizza parlor or other food service establishment which closes certain areas to minors. The physical layout and amenities are hence different.

B. Intended and Actual Patronage. The intended patronage for a tavern was clearly adults only. Many of the objections in Conditional Use Permit 23-91 were to the exclusion of

family dining. See for example, letter of Beverly Hanson (Ex 9) and letter of James Pratt (Ex 8). Respondents have testified that children are welcome on the premises. Indeed, they offered into evidence a list of 25 youngsters who have stopped and purchased food or beverages (Ex 14). A facility which allows children draws a different adult clientele; hence, concerns about fights, disorderly, rowdy people and loud music are substantially reduced.

C. Food Service. In the tavern application, applicants provided a limited menu (Ex 13). Testimony in CUP 22-91 establishes anticipated food revenues of 25% to 50%. Applicants submitted copies of their current menu (Ex 11). Applicants also testified that both their revenue and profit from food sales exceeded 70%. While the Oregon Liquor Control Commission does not license restaurants with malt beverage sales, separate and apart from taverns, the food service rule found at OAR 845-06-032 is applicable by analogy. It defines what constitutes a regular meal and what is considered minimum food service. Applying these standards, the Board finds that applicant provides regular meal service, consistent with restaurant operation.

D. Employment. Applicants testified to employing six (6) people in food service, including cooks, kitchen help and waitresses and three (3) people in beverage sales, this is consistent with a restaurant operation.

E. Neighborhood Perceptions. While the numbers favoring or opposed to an application do not serve as the basis for approval or rejection, community perception is important to distinguish whether neighbors consider the current restaurant application substantially identical to the prior tavern application. If they did, one would expect substantial adverse criticism. In CUP 23-91 (the tavern application), seventeen (17) people spoke against it, perhaps a hundred people signed petitions against it and 57 letters were received in opposition. Upon accepting CUP application 34-91, the Klamath County Planning Director sent notice and provided opportunity to comment to each of those persons who appeared below, as well the same property owners who received notice under Klamath County Land Development Code. To the present application, three persons appeared in opposition and six more wrote letters. Conversely, 14 letters in support were received from residents in the area, a petition in favor was signed by 24 residents of the immediate area (Ex N) and literally hundreds of people signed a petition at the restaurant (Ex 10). While the Board gives little weight to numbers in favor or against the application, it is clear that many who objected to the tavern, no longer object to the restaurant and many who may have been ambivalent to the tavern, now favor the restaurant. The community perceives this application differently than the prior one.

3. The Board concludes that those factors which were the basis for objection to the tavern application are not present here. The Board cannot find, nor have the appellants cited the Board to any evidence in the record, to any new evidence introduced herein, to conclude that the prior application for a tavern is substantially identical to the new application for a restaurant. The Board renews the findings of its earlier Opinion and Order.

The Board concludes that the present application is not substantially identical to the prior application rejected as CUP 23-91.

4. LDC 44.030(C) provides the standards by which a Conditional Use Permit Application must be evaluated:

- "A. The use complies with policies of the Comprehensive Plan;
- B. The use is in conformance with all other required standards and criteria of this codes; and
- C. The location, size, design, and operating characteristics of the proposed use will not have a significant adverse impact on the livability, value or appropriate development of abutting properties and the surrounding area.
- D. Conditions - The review body may grant a Conditional Use Permit subject to such reasonable conditions based on findings of fact that it deems necessary to ensure compliance with the Klamath County Comprehensive Plan, Land Development Code, and sound land use planning principles."

5. To make such an evaluation, we consider:

- A. What are the livability characteristics identified?
- B. What is the value and appropriate development of adjoining properties?

C. What are the impacts of the proposed use on the characteristics?

D. Are the impacts significant?

6. The appellants were asked to identify evidence of substantial adverse impacts which they claim to exist. Instead they maintain that any establishment which allows on-sight consumption of alcoholic beverages does of itself have a significant adverse impact upon the liability of the residential neighborhood. We find that LUBA specifically rejected this argument (LUBA Opinion and Order, Page 9, Line 5). The personal dislike of alcohol is not a basis for refusing to grant this application.

7. We previously analyzed the testimony and evidence in respect to the restaurant application when we took evidence in CUP 34-91. We are asked to return and analyze the letters written in opposition to the tavern application. Some writers offered the opinion that a tavern is not a favorable business, can be a nuisance and may adversely affect the values of surrounding properties. Others were concerned with the appearance of a tavern in the neighborhood; that the reputation of the neighborhood would be affected, and that young, impressionable children should not be near taverns. Still other opponents expressed that doubts and uncertainties of the unknown effects of a tavern might harm resale values of adjoining properties. More than one writer contended that establishing a tavern would cause intoxicated drivers to operate motor vehicles on Madison Street. Still another writer opined that criminal elements are attracted to a tavern; and as there are infrequent police

patrols in the area, drug-dealing, fighting, selling and exchange of stolen property and excessive use of alcohol would result. A writer expressed the opinion that kids would play in the tavern parking lot at night. Other persons claimed that Madison Street had high traffic volumes, resulting in motor vehicle and pedestrian danger while others were of the opinion that Madison Street does not have high traffic volumes, is not well illuminated and as a result would draw criminals into the area. Other persons offered that persons driving under the influence of intoxicants can cause injury and death, that the tavern should be located on main thoroughfares and not in residential neighborhoods. Different writers argued that they purchased their properties in reliance upon "zoning codes" and felt that a tavern should not be allowed in a residential neighborhood. Another felt that there was no social nor economic need for a tavern other than to create an environment for dead beats, drunks and undesirables; that violence and drug trafficking associated with taverns would lower property values. People offered that the area provided a nice residential neighborhood which should be maintained; while others with a contrary view offered that the area was already badly degraded with a diesel repair shop and a large number of low-income housing units and apartments nearby, so that the tavern would further degrade the area. Another writer stated that a tavern would create more police problems including fights, prowlers, noise, domestic disturbances, assaults, DUII, reckless drivers and drug trafficking. Still

another group argued that the sale of alcohol would be an unreasonable and undesirable intrusion into the neighborhood.

8. Each of the statements summarized above constitute personal opinion of the perceived effects of a tavern. A number of the letters, as was noted earlier, expressed the opinion that a restaurant would be desirable while a tavern was not. The testimony above sets forth opinion rather than fact. The fact that may be drawn however, is that 57 people wrote letters in opposition to the tavern, perhaps a 100 signed petitions in opposition and 14 testified against it. Including the three appellants, only 6 people wrote letters in opposition and four people spoke at the hearing for the restaurant. For the restaurant application, numerous people wrote letters and signed petitions in favor. Given the significant difference between the restaurant and tavern application above, the relevance of the prior opinion as the livability is quite remote.

9. Appellants also questioned the locating a tavern on Madison Street. Madison Street is a two-lane paved arterial. The site is located approximately one mile South of South Sixth Street, immediately beyond a railroad crossing. The restaurant is located opposite the stop sign for the railroad crossing. Madison Street ends at Harlan Drive, three blocks beyond this location. The restaurant's surrounding area can be seen in the photographs (Ex 3 and Ex 4) and is described in the record submitted in the prior application. Madison Street, as is the case with most streets in the unincorporated suburban area is not lighted. Appellants have

sought to describe the street as narrow. While it is not a major arterial road, the Board declines to make such finding. It is adequate in alignment, width and surface to support a neighborhood commercial use. No evidence in the record establishes the width of the street. No evidence of traffic speed or traffic counts on the street has been submitted. Immediately to the North of the railroad tracks on Madison Street is a diesel repair shop. Immediately to the East across Madison Street is a one-story triplex. Madison Street does not have sidewalks; this however is consistent with the road standards in the South Suburban area on all be major arterials.

10. The applicants have, in compliance with the conditions previously imposed, channeled traffic into and out of their parking lot so that cars do not back onto Madison Street. They also created an area in front of their establishment suitable for pedestrian travel. No evidence has been adduced to show that traffic travels on Madison Street at a high rate of speed. There are stop signs posted on Madison Street which stop through traffic heading both northerly and southerly, directly in front of the restaurant. Madison Street is well lit at the location of the restaurant; the applicant has created a sidewalk for pedestrian travel and has channeled the traffic into the parking area so that it does not back onto Madison Street.

11. Appellants remaining contention is that the traffic on Madison Street would be increased by the opening of this restaurant. As previously established, the property in question is zoned

neighborhood commercial (CN). Under Klamath County Land Development Code Section 51.000, owners may utilize the property for a number of commercial uses without making application for a conditional use permit. These uses were previously set forth in the Board's original order. The question thus becomes how is the traffic different in type, volume or hour of travel over anticipated traffic and travel which would frequent an outright permitted use. Appellants have asked us to conclude that because alcohol is being served in the establishment, that people will be on the road in an intoxicated state and that their intoxication will cause accidents. Appellants fail to address issues of people consuming alcohol elsewhere, including at home, and driving home within the neighborhood. The conclusion which they assert is tenuous, at best. Outright permitted uses include grocery stores, convenience stores, bakeries, barber shops, beauty shops, shoe repair, office maintenance services, health studios, fitness studios, photographers, photo processing, funeral homes, mortuaries, travel agencies, laundries, laundromats, dry cleaning shops, secretarial services, appliance repair, alteration shops, tailor shops, instrument repairs, bicycle shops, bookstores, camera stores, clothing stores, shoe stores, florist shops, stereo shops, record stores, toy stores and video rentals. Appellants have failed to show how the proposed restaurant use will cause a significant adverse impact, different from those impacts which result from the outright permitted use.

12. The Board returns to address livability standards and addresses the following issues:

A. The neighborhood consists of single-family dwellings, apartments, duplex and triplexes, including low-income housing, single-family dwellings, a truck repair shop permitted as a non-conforming use and this property zoned CN. A number of lots in the area are used for large gardens and animal raising.

B. The property has previously been zoned for and developed in the neighborhood commercial zone. No evidence of existing or future development trends has been introduced. The appropriate development of the subject property is neighborhood commercial.

C. The impact of the proposed use on the neighborhood must be considered in comparison with the impact which would result from outright permitted uses in the neighborhood commercial zone. Impacts of the neighborhood commercial zone include increased traffic through the neighborhood, operation of a commercial establishment during other than daylight hours, incidental noise of people coming and going, light from signs and parking at night. Opponents have however, not identified how each of the impacts set forth above would be different or more intense than those uses permitted outright.

D. If this Board had cited to it adverse impacts upon livability, such as noise, traffic, light, persons attracted, effect on services or effect on value, the Board would have

been able to consider if there would be "significant impacts" which will result from a granting of this application. The opponents provided no such evidence.

Provisions of Klamath County Land Development Code provide much more liberal standards than in many codes. The standard is not "no impact", "only minimal impact" or "limited impact" but instead:

"... the proposed use will not have a significant adverse impact..."

13. Websters II, New World Twentieth Century Dictionary, Second Edition, defines "significant" as: "important, momentous. . ."

Similarly, it defines "adverse" as: "contrary to one's interest or supposed good. . ."

Finally, "impact" is defined as: "a striking together; violent contact, collision. . ."

Accordingly, we conclude the standard requires before conditional use permit may be rejected that we be convinced that the granting of the permit causes an important, momentous disruption of a protected right in a contrary and significant degree to the benefit of another. No such evidence has been presented.

14. We do not analyze the finding or correctness of the hearings officer's prior decision denying the application for a "tavern" in CUP 23-91.

15. We incorporate by reference each of the factual findings contained in our Order of June 25, 1991.

Based upon the foregoing findings of fact, we hereby enter the following conclusions of law:

1. Conditional Use Permit Application 23-91 was for a tavern. This application is for a restaurant. While there are similarities to each, we conclude that there are sufficient differences between both to find that the applications are not "substantially identical". Accordingly, CUP 34-91 has been properly received.

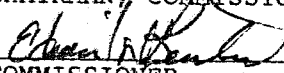
2. The property is in the neighborhood commercial (CN) zone. A restaurant is conditionally permitted unless the location, size, design and operating characteristics of the proposed use would have a significant adverse impact on livability, value or appropriate development.

3. The significant adverse impact contemplated by the code must be judged against the impact on abutting properties in the surrounding area by comparing the proposed use to outright permitted uses within the commercial neighborhood zone. When judged against these standards, there is no showing that the criteria we have considered (nature and extent of traffic, hours of operation, noise, light or public perceptions) differ in any perceptible degree from outright permitted uses.

Dated this 15th day of July, 1992.



CHAIRMAN, COMMISSIONER

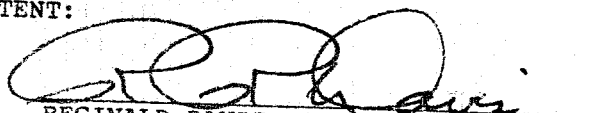


COMMISSIONER



COMMISSIONER

APPROVED AS TO FORM AND CONTENT:


REGINALD DAVIS, COUNTY COUNSEL

NOTICE OF APPEAL RIGHT:

You are hereby notified that this decision may be appealed to the Land Use Board of Appeals within 21 days following the mailing of this order.

Failure to do so in a timely fashion may affect your right to appeal the decision.

STATE OF OREGON; COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County the 20th day
of July A.D. 19 92 at 3:30 o'clock P. M., and duly recorded in Vol. M92
of Deeds on Page 16032
FEE none Evelyn Biehn County Clerk
By Pauline Willard

Return: Commissioners Journal