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BEFORE THE KLAMATH COUNTY COMMISSIONERS  
KLAMATH COUNTY, OREGON

In the Matter of the appeal of	)	
CUP No. 66-96 and LP No. 48-96	)	CUP No. 66-96
Applicant: Steve Ennis	)	LP No. 48-96
	)	ORDER

**I. NATURE OF THE APPEAL:**

The application in this matter was for a land partition to divide a 14.7 acre parcel into two parcels; consisting of 10.1 acres and 4.5 acres. The application was for a Conditional Use Permit by Steve Ennis to establish a church upon the 4.5 acre parcel and either to establish a dwelling not in conjunction with farm use on the larger parcel or to leave the larger parcel in fallow. The property is located in Yonna Valley, on Highway 140 East. This matter came before the Hearings Officer, Neal Buchanan, on August 16, 1996. The subsequent Order approving the land partition and Conditional Use Permit was entered by the Hearings Officer on August 28, 1996. An appeal was subsequently filed on September 4, 1996. The hearing held by the Klamath County Board of Commissioners was October 7, 1996, and an Order was entered on October 14, 1996, remanding the matter to the Hearings Officer for further consideration. The Hearings Officer held further hearings on November 15, 1996 and entered this Order granting the Conditional Use Permit and land partition on December 27, 1996. That Order was appealed by Michael P. Rudd, representing Paul and Carol Ritter. The hearing on appeal was heard on February 3, 1997, before the Board of County Commissioners of Klamath County, Oregon.

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Said appeal was upheld. Such decision is reflected by this Order.

**II. NAMES OF THOSE WHO PARTICIPATED:**

At the second appeal heard on February 3, 1997, the Commissioners present were Al Switzer, Bill Garrard and Steve West. Michael P. Rudd appeared on behalf of the appeal applicants, Paul and Carol Ritter. The applicant, Steve Ennis, appeared by and through his attorney William Ganong. Kim Lundahl, Klamath County Senior Planner, was present on behalf of the Klamath County Planning Department. Reginald R. Davis, Klamath County Counsel, was present. The Recording Secretary was Karen Burg.

**III. PROPERTY DESCRIPTION AND LOCATION:**

The subject property is a 14.7 acre parcel located on Highway 140 East, three-fourths of a mile east of Yonna Drive and Yonna Valley, Klamath County, Oregon. The subject property is outside of the Urban Growth Boundary.

**IV. RELEVANT FACTS:**

The property in question is zoned EFU-CG. The property is composed of SCS Class III and is triangular in shape. The property has been farmed in the past and has grown such produce as strawberries, alfalfa and potatoes. For the past three years it has laid fallow. There exist upon the property a water right granted by the State of Oregon and evidenced in the permit to appropriate the public waters. Said permit has been made a part of the record. The testimony in the record indicates that Paul and Carol Ritter and Mr. Jertberg farmed the parcels as recently as 1993, used water from the appropriate well and realized a profit

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from the property. Gross revenues per acre for strawberries were in excess of \$11,000.00 per acre and grossed as high as \$15,000.00 per acre. Furthermore, the property has been used in the past in conjunction with the Ritter property as part and parcel of a larger farming operation and could easily be used for that purpose again. Paul and Carol Ritter testified at the hearing that the parcel could be incorporated into their farming activities.

The subject area is generally agricultural in nature.

As testified at the hearing by Mr. Malloms aerial spraying as conducted by Paul and Carol Ritter would cause some drift upon the property and that aerial drift does occur. Paul and Carol Ritter testified that they were concerned as to their farming operations and the application of aerial pesticides which could adversely affect their farming operations.

The soil in the area is Class III soil which is the highest value soil in the Klamath Basin. Water rights exists upon the property as evidenced by the right to appropriate the public waters. The property has been used in the past and can be used again for productive and profitable farm land and the cost of irrigation is not prohibitive as evidenced by Paul and Carol Ritter's testimony and Mr. Jertberg's testimony that this land can be farmed for a profit and supplied with appropriate water.

#### V. RELEVANT CRITERIA:

The Application of Steve Ennis was for a land partition and for a Conditional Use Permit to place a church upon the smaller parcel created by the land partition. Applicable criteria includes

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the Oregon Statewide Planning Goals and Guidelines, the Purpose Statement contained in the Klamath County Land Development Code and Chapter 54 of the Klamath County Land Development Code.

The Oregon Statewide Planning Goals and Guidelines, Goal 3, entitled *Agricultural Lands*, reads in relevant part as follows:

"To preserve and maintain agricultural lands. Agricultural land shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products. . . . B. IMPLEMENTATION 1. Non-farm uses permitted within farm use zones . . . should be minimized to allow for maximum agricultural productivity."

The Klamath County Land Development Code mimics these goals and policies commencing with Chapter 50 entitled *Land Use Zones*, whose basic provisions commence with the following:

"The purpose of this chapter is to establish land use zones required to implement the goals and policies of the Klamath County Comprehensive Plan . . . more specifically, the zones are formulated; . . . C. To support the protection and preservation of agricultural . . . industry and the natural resources essential to the conduct of those industries."

Article 54 of the Klamath County Land Development code is the pertinent sections of the LDC in relation to this application.

Article 54, entitled *Exclusive Farm Use (EFU)* begins with a Purpose Statement in Article 54.010. That Purpose Statement reads in relevant part as follows:

"The purpose of the exclusive farm use zones is to preserve and maintain agricultural lands for farm use and future needs for agricultural products . . . the EFU zone is applied to those areas which meet the definition for agricultural lands in Oregon Statewide Planning Goal 3. Further, the EFU zones are intended to guaranty the preservation and maintenance of those areas so classified for farm use, free from conflicting non-farm uses and influences. Each zone is subject to change only in those instances where there is substantial evidence that such

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land is no longer suitable for agriculture or that there has been a significant and substantial change in the land needs in the county which clearly demonstrates that such land is needed for uses other than agriculture."

The land at issue is highly suitable for agricultural needs. It is Class III soil with irrigation rights and water rights to irrigate the property. The parcel has been farmed as recently as 1993, at which time strawberries were grown on the property which yielded gross revenues of \$11,000.00 to \$15,000.00 per acre. Class III soil is the highest class of soil in the survey area. See SCS Soil Classification Exhibit.

By definition, Class III soil is the main potato producing soil in the survey area and the property has been used in the past to grow alfalfa, potatoes and strawberries. Permit No. G11139 and Mr. Jertberg's testimony support the conclusion that this land is productive agricultural property. The map evidences that the subject property is surrounded on three sides by the Ritter property and is contiguous with those parcels. The property could be farmed by the Ritters quite easily and made part and parcel of the contiguous larger farm property.

The burden and nature of proof in this instance lies upon the applicant, Steve Ennis. Klamath County Land Development Code Section 31.090 states as follows:

"BURDEN AND NATURE OF PROOF . . . C. The more drastic the proposed change, or the greater the impact of the proposal on other land uses and properties, the greater the burden of proof of the proponent to show how the proposal complies with or is consistent with the Comprehensive Plan and the Land Development Code."

There is no greater change in land use than taking the highest

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type of soil, agricultural property, and removing it from farm use thus allowing for non-farm use. Furthermore, the conditional use criteria enumerated in the Klamath County Land Development Code, Section 54.040, is more stringent and is supplemental to those enumerated in Section 44.030, the ordinary Conditional Use Permit requirements. In order to obtain a Conditional Use Permit in the EFU zone, it must be shown that the proposed use will not create conditions or circumstances that the County determines would be contrary to the purposes or intent of the Comprehensive Plan or the policies of the Code.

The nature of the Application in this instance is somewhat vague. The use of the larger parcel is the vagueness involved. The smaller 4.5 acre parcel was to be used and a CUP applied for, to establish a church. The larger parcel consisting of 10.1 acres was either to remain fallow as the applicant purposes or was to become a non-farm dwelling site. Both purposed uses for the larger parcel fail for the following reasons:

a. Non-farm dwelling: If the 10.1 acre parcel is to be used as a non-farm dwelling as the Planning Department Application indicates, the Application fails pursuant to the Code requirements. Article 54.070 entitled *Non-farm Dwellings* would be the relevant review criteria. That review criteria indicates that the Application shall be approved only if all criteria are met. Article 54.070, the proposed criteria, reads in relevant part as follows:

"B. REVIEW CRITERIA . . . 3. The proposed dwelling shall be situated upon a lot or parcel or a portion of a

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lot or parcel that is generally unsuitable land for the production of farm crops and livestock . . . a lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm or forest use in conjunction with other land. If it can be sold, leased, rented or otherwise managed as a part of commercial farm or ranch it is not 'generally unsuitable'. A lot or parcel is presumed suitable if it is composed predominately of Class I through VI soils."

As contained in the record, the soil at issue is Class III soil, and therefore, is deemed by the Code to be suitable. Additionally, the triangular shape of the parcel nor its size precludes it from becoming, or being used in conjunction with other lands. Pursuant to Article 54.070 of the LCD, proposing this parcel as a non-farm dwelling fails.

The parcel is deemed suitable by the Code and can be used as part and in conjunction with other lands. Paul and Carol Ritter's testimony at the hearing and Mr. Jertberg's testimony at the hearing indicates the property is suitable land to be irrigated and harvested for profit. Paul and Carol Ritter had offered to purchase the property and firmly believe it can be operated for profit.

b. The larger parcel is to remain fallow: If the larger parcel is to remain fallow as proposed by the applicant, the applicant violates the Code provisions in relation to use upon the property in the land partition.

The Klamath County Land Development Code requires that use must be established when land partitions occur in the EFU Zone. The Land Development Code, Section 54.090 entitled *Land Divisions in EFU Zone* reads in relevant part ". . . use must be established

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along with parcel creation . . . ".

As the Planning Department, by and through Kim Lundahl, correctly pointed out at the hearing, the use of the non-farm 10.1 acre parcel must be established. An applicant cannot create a parcel less than 80 acres without an approved non-farm use.

Regardless of the vagueness of the Application, it is not proper for the applicant to leave the larger parcel fallow which would violate Section 54.090 of the Land Development Code nor would it be proper for the applicant to establish a non-farm dwelling upon the parcel which would violate Section 54.070 of the Land Development Code. Finally, the property is available and would be "a lot or parcel suitable for farm use". The parcel shall not be excluded or determined unsuitable solely because of its size or location if it can reasonable be put to farm use in conjunction with other land. The Ritter's land abuts the property on three sides and could very easily, as has in the past, be used for farming activities. The Ritters have offered to purchase the property and as Mr. Jertberg testified, it is not cost prohibitive to provide irrigation to the property and, indeed, has been used in the past for profit.

As the Finding of Fact indicate, this is Class III soil which by definition is suitable for farming production. Water rights exists upon the property and the property has been used in the past and can be used in the future for profitable production of agricultural products. The property is zoned EFU-CG and is surrounded on all sides by EFU-CG property except for that portion

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lying along Highway 140 East which borders upon the southerly portion of the property.

Further criteria for a Conditional Use Permit in an EFU-CG zone is found in Section 54.040 of the Klamath County Land Development Code. The procedure for the granting of a Conditional Use Permit, but not the criteria, is found in Article 44 of the Klamath County Land Development Code.

In making the Findings of Fact, the Board has considered the Staff Reports, the Exhibits and the testimony offered in the proceedings before the Hearings Officer. It is the general findings of the Board that the applicant had made the Application for a land partition and a Conditional Use Permit.

#### VI. CONCLUSIONS:

A. The property is Class III soil, zoned EFU-CG, has been used in the past for the profitable production of agricultural products, has water rights upon the property and can be used in the future as a profitable parcel of property for the production of agricultural products.


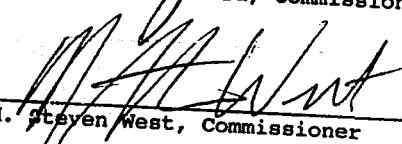
B. The proposed land partition fails to establish a use with the parcel creation which is contrary to the provisions of Article 54.070 and Article 54.090 of the Land Development Code. Furthermore, an applicant cannot create a parcel of less than 80 acres without an approved non-farm use.

C. The proposed use and partition is not in conformance with the Statewide and Land Development Code Goals, Policies and Guidelines.

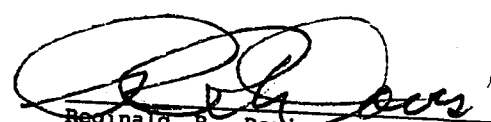
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## VII. ORDER:

Based upon the findings and conclusions herein, Land Partition No. 48-96 and CUP No. 66-96 for Steve Ennis is hereby denied.

DATED: 3-10-97
  
 Al Switzer, Chairman
DATED: 3-10-97
  
 Williams R. Garrard, Commissioner
DATED: 3-12-97
  
 M. Steven West, Commissioner

APPROVED AS TO FORM AND CONTENT:

DATED: 7 Mar 97
  
 Reginald R. Davis, Klamath County Counsel

## NOTICE OF APPEAL RIGHTS

You are hereby notified that this decision may be appealed to the Land Use Board of Appeals within twenty-one (21) days following the date of the mailing. Contact the Klamath County Planning Department for more information regarding this procedure. Failure to appeal within the time provided will result in the loss of your right to appeal this decision.

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STATE OF OREGON : COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County  
 of March A.D., 19 97 at 11:53 o'clock A.M., and duly recorded in Vol. M97  
 of Deeds on Page 7437

Return: Commissioners Journal

Bernetha G. Letsch, County Clerk

FEE No Fee

by Kathleen Rose