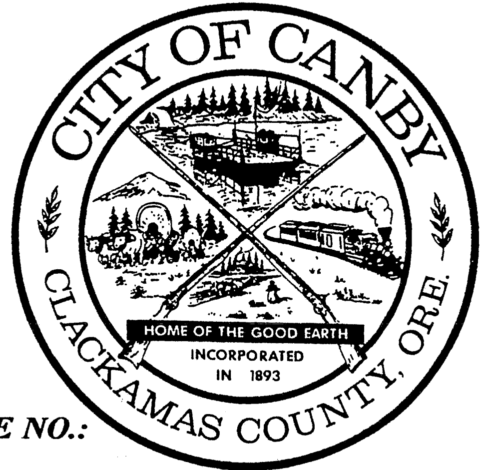
PLANNING COMMISSION
SIGN-IN FORM

Date: January 8, 1996

PLEASE PRINT CLEARLY

NAME	ADDRESS
David Berge / Nellie Buxton	1040 N Birch St
Phil Seale	715 NW Territorial
Bob Brison	25263 S. Lilli Ln.



-STAFF REPORT-

APPLICANT:

M:&W Building Supply Co.
P.O. Box 220
Canby, OR 97013

FILE NO.:

DR 95-20
(Potters Industries)

OWNER:

Potters Industries
350 N. Baker
Canby, OR 97013

STAFF:

James S. Wheeler
Assistant City Planner

LEGAL DESCRIPTION:

Tax Lot 1001 of Tax Map 3-1E-32D

DATE OF REPORT:

December 28, 1995

LOCATION:

350 N. Baker, northeast corner of
N.W. 3rd Avenue and N. Baker

DATE OF HEARING:

January 8, 1996

COMP. PLAN DESIGNATION:

Light Industrial

ZONING DESIGNATION:

M-1 (Light Industrial)

I. APPLICANT'S REQUEST:

The applicant is requesting site and design approval to construct a 60x120x14 post frame warehouse building. The development is proposed to occur at the southwestern edge of the existing Potters Industries complex.

II. APPLICABLE REGULATIONS

- **City of Canby General Ordinances:**

16.10	Off-Street Parking and Loading
16.32	M-1 - Light Industrial Zone
16.49	Site and Design Review
16.88	General Standards

III. MAJOR APPROVAL CRITERIA

Site and Design Review

The Planning Commission, sitting as the Design Review Board, shall, in exercising or performing its powers, duties or functions, determine whether there is compliance with the following:

A. The proposed site development, including the site plan, architecture, landscaping and graphic design, is in conformance with the standards of this and other applicable City ordinances insofar as the location, height and appearance of the proposed development are involved; and

B. The proposed design of the development is compatible with the design of other developments in the same general vicinity; and

C. The location, design, size, color and materials of the exterior of all structures and signs are compatible with the proposed development and appropriate to the design character of other structures in the same vicinity.

The Design Review Board shall, in making its determination of compliance with the requirements set forth, consider the effect of its action on the availability and cost of needed housing.

IV. FINDINGS:

A. Background and Relationships:

The applicant is requesting approval to construct a 7,200 square foot warehouse building. The building will not be serviced by power or water, and will be utilized to keep some of their products moisture free until shipping. The development is proposed to be located on Tax Lot 1001 of Tax Map 3-1E-32D. The property is located on the north side of N.W. 3rd Avenue and the east side of N. Baker. The size of the total lot is 9.98 acres.

B. Evaluation Regarding Site and Design Review Approval Criteria

1. Part IV - Section 2, No. 2

"Minimum area for landscaping is 15% of the total area to be developed."

The minimum amount of landscaping required for the 178,036 square foot developed portion of the parcel is 26,705 square feet (15%). The total amount of landscaping proposed is approximately 12,876 square feet (7.2%). Approximately 11,760 square feet of existing grass area will be removed by the proposed development (6.6%). Over 5 acres of the total site is still undeveloped. If the area between the corner of the street intersection and the development is designated for landscaping, then 29,351 square feet of landscaping will be provided for the 193,836 square foot developed area (15.1%).

2. Parking.

The number of parking spaces required for the total development is 39 (5.0 for the 1440 square feet of office space, and 26.6 for the 26,640 square feet of existing warehouse/manufacturing space). There are currently 17 parking spaces. The proposed warehouse requires an additional 7 parking spaces. The applicant has stated that the proposed warehouse will not require any changes in the current operation of the facility nor any changes in the number of employees or shifts being worked. Therefore, the applicant maintains that no additional parking is necessary for the proposed warehouse. The applicant is responsible only for the proposed additional parking, not for any deficiencies of the current operation with the current ordinance (16.10.010.B).

Unless specifically waived by the Planning Commission, in accordance with the provisions of 16.10.010.A ("A lesser number of spaces may be permitted by the Planning Commission based on clear and objective findings that a lesser number of parking spaces will be sufficient to carry out the objective of this section."), 7 additional parking spaces are required. Possible "clear and objective findings" for no additional parking spaces is that there will be no personnel or shift changes as a result of the construction of the proposed warehouse.

One loading area has been proposed to be specifically designated. The loading and unloading of material to and from the proposed building will occur by forklift, so that no special loading facilities will be required.

3. Access

There are three existing access drives from N. Baker to the existing buildings. The proposed warehouse will be constructed in between the two southern drives. No additional access drives will be necessary.

4. Architecture

The building will be of similar size, material (metal sides and roof), and color (white sides and roof), as the existing storage warehouse located immediately to the east of the proposed building. Both the existing and the proposed buildings will be visible from N.W. 3rd Avenue. The proposed building will obscure view of the existing warehouse from N. Baker.

There are no new signs proposed for the site. The existing fence will be relocated to encompass the proposed building.

5. Other Aspects

a. Utilities

Service providers have not indicated that there would be any problem in servicing this proposal. All utilities are available in either N.W. 3rd Avenue or N. Baker.

If floor drains are installed in the building, a Data Disclosure Form will need to be filled out and approved by the Wastewater Treatment Plant Supervisor.

b. Landscaping

The landscaping area is already existing. There is a row of shrubs located between the existing parking and N. Baker. The landscape area in between the proposed building and N. Baker is grass, and grass is the landscaping that will be removed by the proposed building. The area that is being suggested by staff for landscape designation, is grass and trees. This designated landscape area encompasses the area 110 feet east of N. Baker Street, from N.W. 3rd Avenue to the new fence and existing southern access drive.

No other landscaping is proposed by the applicant or suggested by staff.

c. **Parking Lot Landscaping**

There is no new parking area or driveway. A future concrete drive area to the east of the proposed building will be 3,000 square feet in size, less than the 3,500 square feet minimum size for adding the "parking lot landscaping" requirements.

If additional parking is required, then some landscaping requirements may be necessary. The additional parking could be located along the southern access drive with the landscaped area immediately the south, the requirements will be met, provided that two trees are planted within ten (10) feet of the parking spaces.

d. **Density and yards and height**

The setbacks and the height requirements for the M-1 zone have been met by this development proposal.

V. CONCLUSION

The staff hereby concludes that, with appropriate conditions, the proposed development as described in the application, site plan, and this report, is in conformance with the standards of this and other applicable ordinances; the design is compatible with the design of other developments in the vicinity; and, the location, design, size, and materials of the exterior of the structure will be compatible with the proposed development and appropriate to the design character of other structures in the same vicinity.

Further, staff concludes that, with approval conditions:

1. the proposed development of the site is consistent with the applicable standards and requirements of the Canby Municipal Code and other applicable City ordinances insofar as the location, height and appearance of the proposed development are involved; and

2. the proposed design for the development is compatible with the design of other developments in the same general vicinity; and

3. the location, design, size, color and materials of the exterior of all structures and signs are compatible with the proposed development and appropriate to the design character of other structures in the same vicinity; and

4. the conditions listed are the minimum necessary to achieve the purposes of the Site and Design Review Ordinance, and do not unduly increase the cost of housing.

VI. RECOMMENDATION:

Based upon the application, elevations, the site plan received by the City, the facts, findings and conclusions of this report, and without the benefit of a public hearing, staff recommends that should the Planning Commission approve DR 95-20, the following conditions apply:

Prior to the issuance of the Building Permit:

1. The Data Disclosure Form shall be completed and submitted to the City's Sewer Department prior to the issuance of a building permit.

For the Building Permit Application:

2. Seven (7) additional parking spaces shall be provided. There shall be 600 square feet of landscaping, and two (2) trees located with ten (10) feet of the parking spaces.

During Construction:

3. Erosion-control during construction shall be provided by following Clackamas County's Erosion Control measures.

Notes:

4. The area between N.W. 3rd Avenue and the new fence and existing drive along the southern perimeter of the developed portion of the property, and 110 feet east of N. Baker, shall be considered to be designated for landscaping. No other development shall be permitted without prior approval from the Planning Commission.

Exhibits:

1. Application for Design Review
2. Vicinity Map
3. Site Plan/Elevations/Landscape Plan
4. Department Responses to "Request for Comments"

SITE AND DESIGN REVIEW APPLICA[illegible]ON

Fee: $750

OWNER		APPLICANT	
NAME	Potters Industries	NAME	M & W Building Supply Co.
ADDRESS	350 N. Baker	ADDRESS	P.O. Box 220
CITY	Canby STATE OR ZIP 97013	CITY	Canby STATE OR ZIP 97013
SIGNATURE	[signature]	PHONE:	1-503-263-6953 266 7200

DESCRIPTION OF PROPERTY:

TAX MAP 4-1E 32D TAX LOT(S) 1001 LOT SIZE 9.98 Acres (Acres/Sq. Ft.)

or

LEGAL DESCRIPTION, METES AND BOUNDS (ATTACH COPY)
PLAT NAME ____________ LOT ____ BLOCK ________

PROPERTY OWNERSHIP LIST

ATTACH A LIST OF THE NAMES AND ADDRESSES OF THE OWNERS OF PROPERTIES LOCATED WITHIN 200 FEET OF THE SUBJECT PROPERTY (IF THE ADDRESS OF THE PROPERTY OWNER IS DIFFERENT FROM THE SITUS, A LABEL FOR THE SITUS MUST ALSO BE PREPARED AND ADDRESSED TO "OCCUPANT"). LISTS OF PROPERTY OWNERS MAY BE OBTAINED FROM ANY TITLE INSURANCE COMPANY OR FROM THE COUNTY ASSESSOR. IF THE PROPERTY OWNERSHIP LIST IS INCOMPLETE, THIS MAY BE CAUSE FOR POSTPONING THE HEARING. THE NAMES AND ADDRESSES ARE TO BE *typed onto an 8-1/2 x 11 sheet of labels,* JUST AS YOU WOULD ADDRESS AN ENVELOPE.

USE

EXISTING Manufacturing
PROPOSED 60x120x14 Storage Shed Only

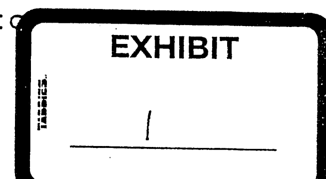
EXISTING STRUCTURES 60x100, 60x168, and 100x120

SURROUNDING USES Manufacturing and light industrial with some residential
PROJECT DESCRIPTION 60x120x14 Post Frame Building
Warehouse - No electrical or plumbing

ZONING MI COMPREHENSIVE PLAN DESIGNATION Light Industrial
PREVIOUS ACTION (IF ANY) ____________

FILE NO. DR 95-20
RECEIPT NO. 9771
RECEIVED BY D Harms
DATE RECEIVED 12-13-95
COMPLETENESS DATE 12-14-95
PRE-AP MEETING ________
HEARING DATE 1-8-96

* IF THE APPLICANT IS NOT THE PROPERTY OWNER, HE MUST ATTACH DOCUMENTARY EVIDENCE O[F AUTHORITY] TO ACT AS AGENT IN MAKING APPLICATION.

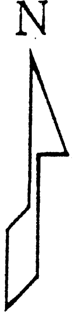


Narrative:

Potters Industries wants to build a 60x120x14 Post Frame Storage Building with no power or water. They need to keep some of their products free of moisture before shipping. This warehouse will take the need to rent space somewhere else. The reason for more space is to get prepared to have enough product for their short dry season in the summer months. This would allow them to have enough product for their demands.

There will not be any personnel or shift changes. There will be no trucks going into or thru this building. All material will be moved in or out by forklift. There will be a future area for unloading that will be paved or concreted to prevent any road obstruction.

If needed, additional parking can be added, but at any given time there is two or three spaces available.



VICINITY MAP

EXHIBIT 2

N. BAKER

543.0'

158' | 24 | 120' | 41 | 100.0' | 100.0'

165' | 120' | 13 | 28 | 75 | 25 | 100.0'

FIRE HYDRANT

FIRE HYDRANT

SHRUBS

FIRE HYDRANT

DRIVE WAY

EXISTING PAVED

EXISTING PAVED

EXISTING BLACKTOP PARKING

DRYWELL

NEW FENCE LINE 100'

GRASS

CONCRETE WALKWAY

DRYWELL

20 x 72 OFFICE AREA

PLANT BLDG 60 x 100

60

FUTURE CONCRETE

DRIVEWAY

PROPOSED NEW STORAGE BUILDING W/ CONCRETE FLOOR 60 x 120

DRIVEWAY

25

FUTURE CONCRETE

DRYWELL

TREES

120

100 x 120 EXISTING STORAGE WAREHOUSE

PAVED DRIVE

PLANT BLDG 60 x 168

GAS METER

GRASS

FIRE HYDRANT

ALL AREAS INSIDE FENCE ARE PAVED

STORAGE SLAB

STORAGE SLAB

DRYWELL

ROW OF ALDER TREES ALONG BACK FENCE LINE

EXISTING PROPANE TANK

901.03'

SITE PLAN

BTTEC INDUSTRIES

310 N. BAKER [illegible]

SCALE 1" = 60'

HIGH GRASS & CATTAIL AREA

N

EXHIBIT 3

PLEASE RETURN ATTACHMENTS!!!

CANBY PLANNING DEPARTMENT
REQUEST FOR COMMENTS

P.O. Box 930, Canby, OR 97013 *[503] 266-4021*

DATE: December 15, 1995

TO: FIRE, POLICE, CUB, MIKE JORDAN, ROY, STEVE

The City has received ***DR 95-20*** an application by M & M Building Supply Co. [appplicant] and Potters Industries [owner] for design review approval to construct a 60x120x14 post frame warehouse building. The 9.98 acre site is located on the corner of N. Baker and NE 3rd Avenue [Tax Lot 1001 of Tax Map 4-1E-32D].

We would appreciate your reviewing the enclosed application and returning your comments by **December 26, 1995 PLEASE.** The Planning Commission plans to consider this application on January 8, 1996. Please indicate any conditions of approval you may wish the Commission to consider if they approve the application. Thank you.

Comments or Proposed Conditions:

If Floor drains are to be Installed there can be no process wastewater discharge without "DDF" Application & Review by me.

Please check one box:

☒ Adequate Public Services (of your agency) are available

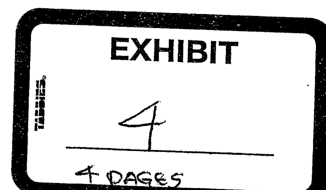
☐ Adequate Public Services will **become available** through the development

☐ Conditions are needed, as indicated

☐ Adequate public services **are not available** and will not become available

Signature: Steph D Hanson Date: 12/20/95

Title: POTW Supervisor Agency: WWTP



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Signature: Jerry [illegible] **Date:** 12-18-95

Title: Police Chief **Agency:** Canby Police Dept.

PLEASE RETURN ATTACHMENTS!!!

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REQUEST FOR COMMENTS

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Comments or Proposed Conditions:

Okay as proposed

Please check one box:

☒ Adequate Public Services (of your agency) are available

☐ Adequate Public Services will **become available** through the development

☐ Conditions are needed, as indicated

☐ Adequate public services **are not available** and will not become available

Signature: Roy L. Kester **Date:** Dec. 19, 1995

Title: Public Works Supervisor **Agency:** City of Canby

PLEASE RETURN ATTACHMENTS!!!

CANBY PLANNING DEPARTMENT
REQUEST FOR COMMENTS

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DATE: December 15, 1995

TO: FIRE, POLICE, CUB, MIKE JORDAN, ROY, STEVE

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☐ Adequate public services **are not available** and will not become available

Signature: Ron Yarbrough **Date:** 12-22-95

Title: Fire Marshal **Agency:** CANBY F.D. #62

MEMORANDUM

TO: ***Planning Commission***

FROM: ***James S. Wheeler, Assistant City Planner*** JSW

DATE: ***December 28, 1995***

RE: ***Setback requirements and measurements***

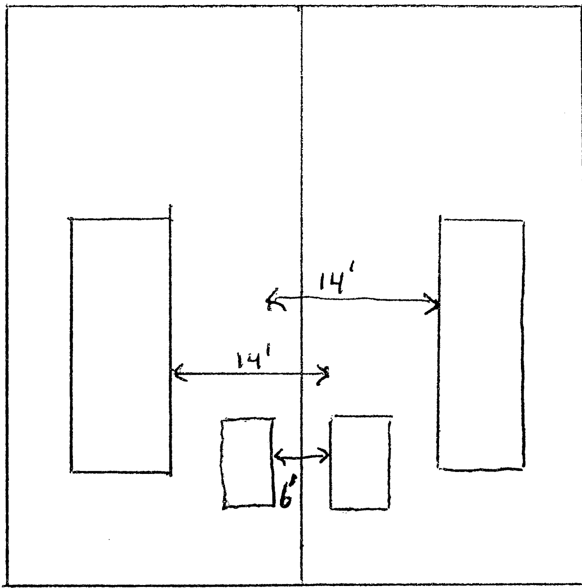
At the December 11, 1995 meeting, the Planning Commission accepted a revision to staff's interpretation of setbacks between manufactured homes (units) and either garages or carports on an adjacent site, and between garages and/or carports on adjacent sites. Exhibit 1 is a drawing that hopefully depicts what was accomplished at the last meeting.

Unfortunately, through my error, the interpretation revision does not adequately address the problem that has arisen in Pine Crossing Manufactured Home Park. It was very clearly stated at the December 11, 1995 meeting that carports and garages that are attached to the units are considered to be a part of the units and the required 14 foot setback to an adjacent structure is to be measured from the unit (including attached carport or garage). Exhibit 2 is a copy of the approved site plan submitted as a part of the Site and Design Review for the park. The plans clearly show an attached garage being proposed to be located closer than 14 feet to a structure on an adjoining site (in this case, an attached carport).

The question that is being put to the Planning Commission is: "Is measuring the setback from unit to permanent structure on an adjacent site acceptable through a garage or carport?" If the answer is yes, exhibit 3 shows what this will look like. Additionally, the setback between adjacent garages/carports will still be a minimum of 6 feet as required by the Building Code.

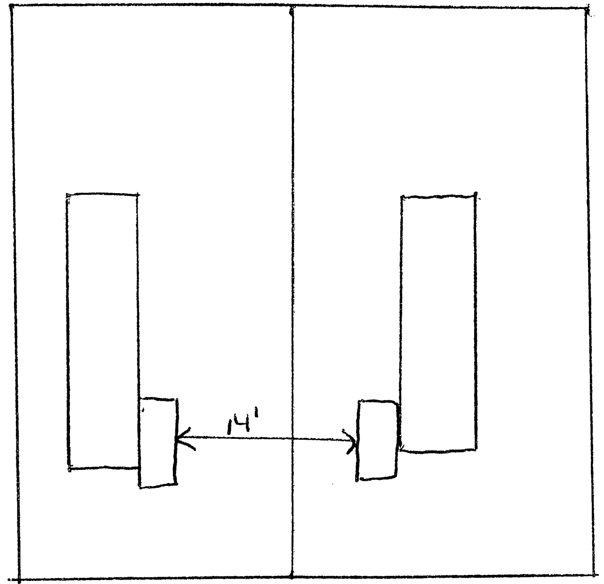
Approved Interpretation 12/11/95

Exhibit 1



Detached Carport/Garage

Detached Carport/Garage



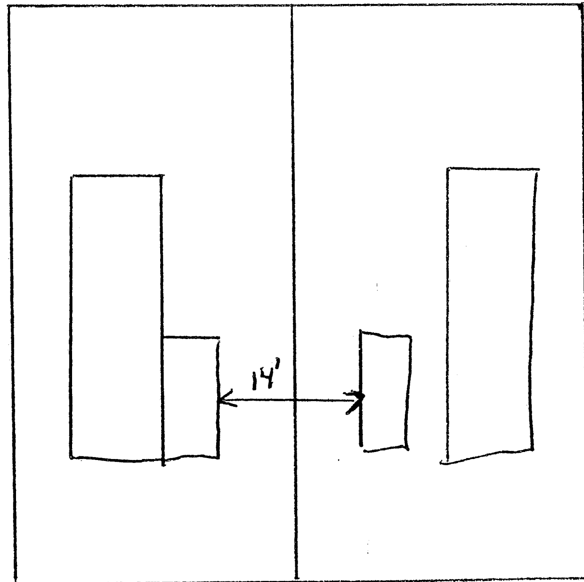
Attached

Attached

14' separation

14' from home to adjacent carport/garage

6' from adacent carports/garages



Garage/Carport attach to home

detached carport/garage

14' separation

Exhibit 2

Approved Site Plan

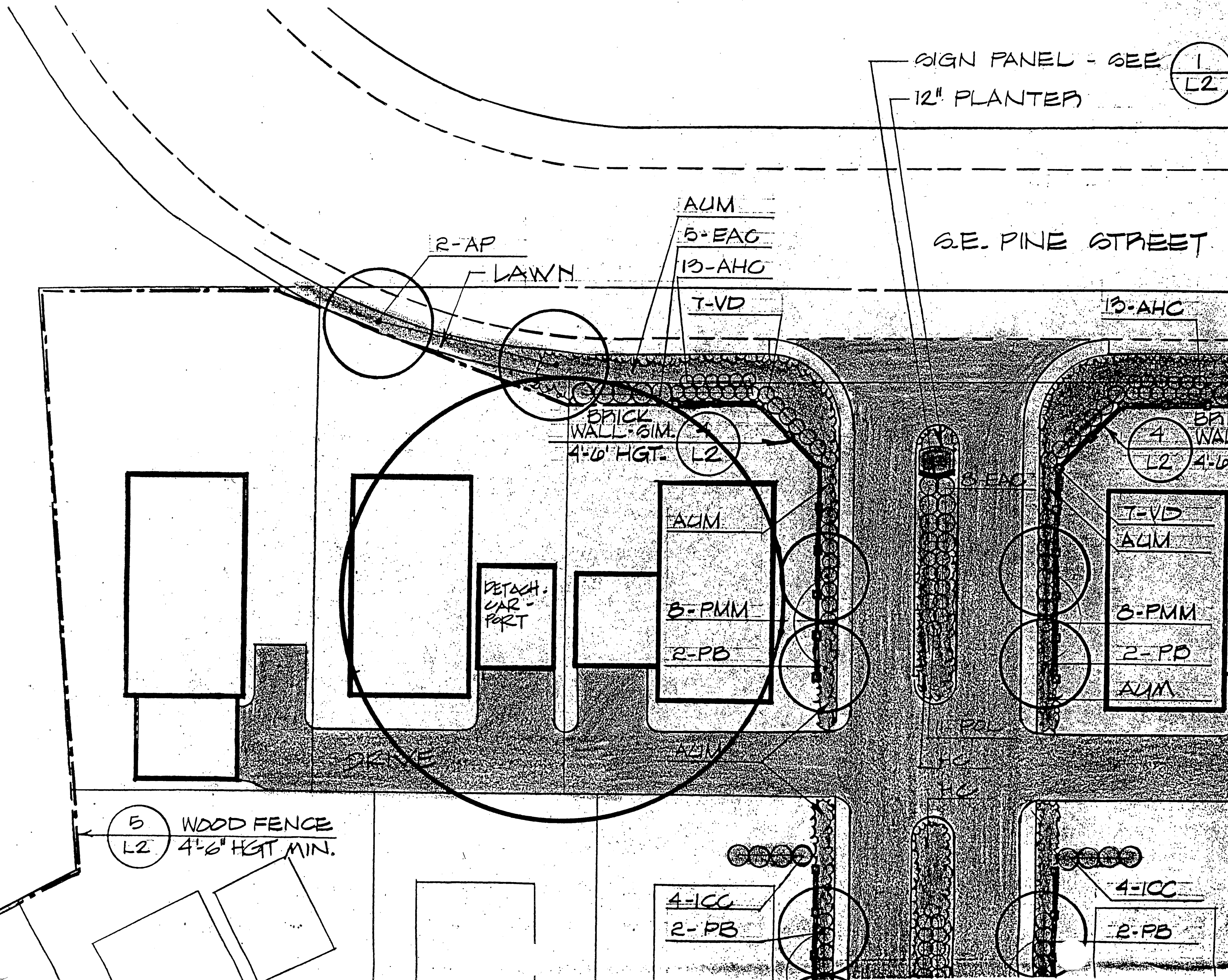
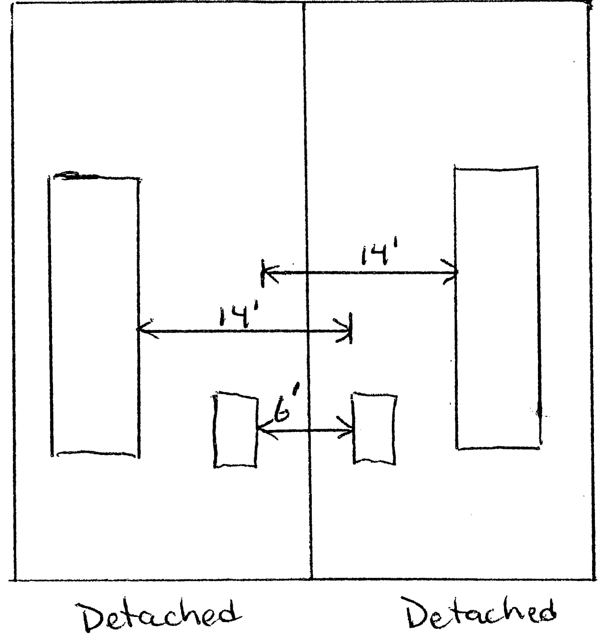
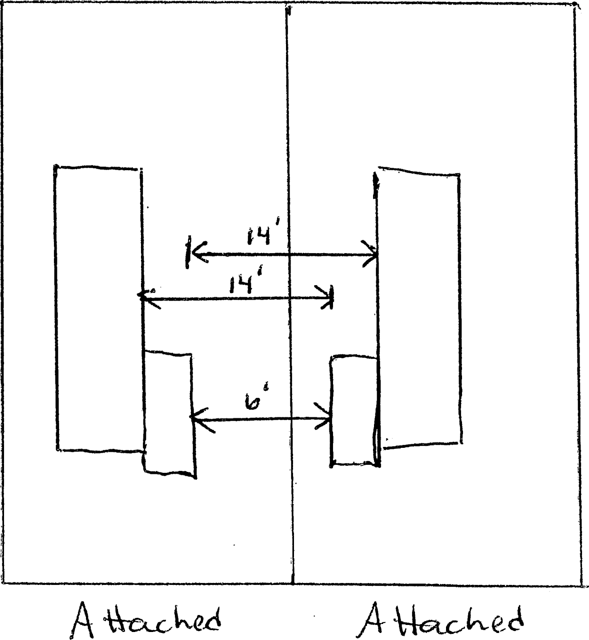
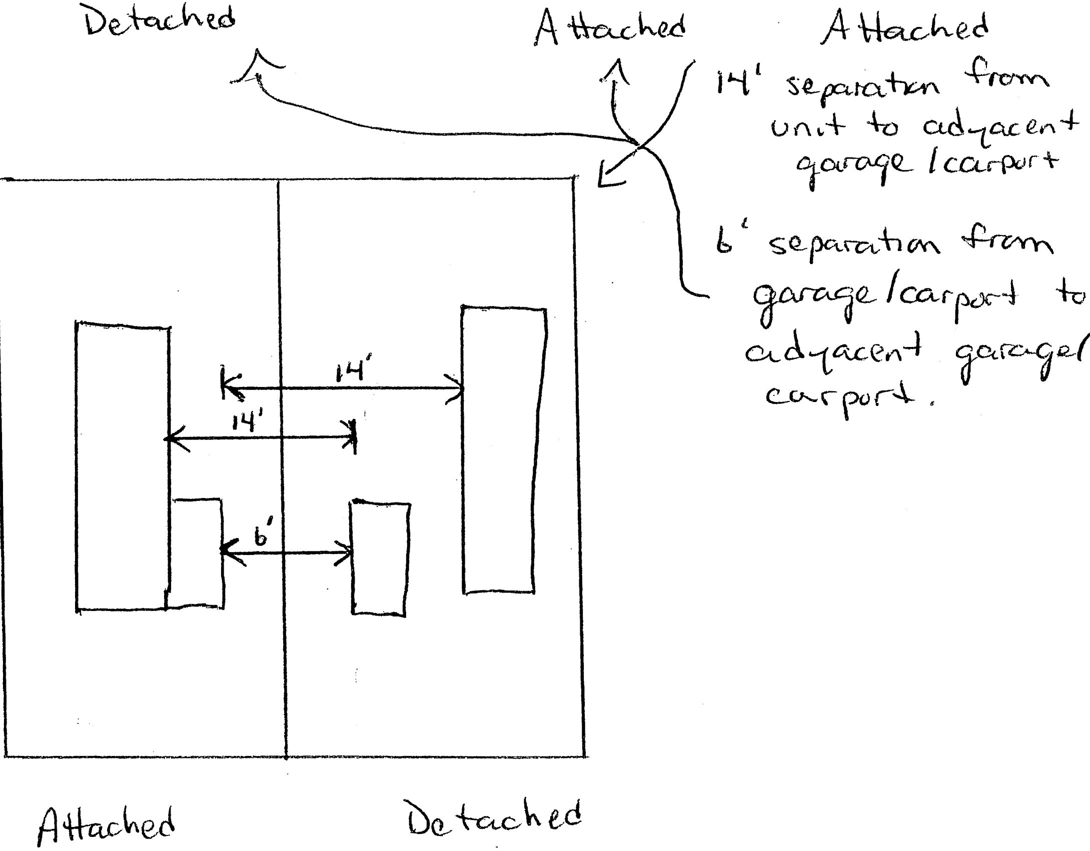


Exhibit 3

Possible Interpretation







-M E M O R A N D U M-

TO: ***Planning Commission***

FROM: ***James S. Wheeler, Assistant City Planner*** JSW

DATE: ***December 28, 1995***

RE: ***INT 95-02, Appeal of Staff Interpretation regarding fence height restrictions***

David Berge and Julie Buxton, residents of 1040 N. Birch Street had a fence built. The fence structure, as staff interprets, includes an arbor trellis. The overall structure height is in excess of the permitted 3-1/2 feet within the street yard setback. The Code Enforcement Officer, Steve Floyd, was made aware of the situation and proceeded to inform Mr. Berge and Ms. Buxton of the violation. Ms. Buxton contacted the Planning Office to seek relief. The process that was suggested was to put a request for an interpretation of the fencing requirements in writing, then have staff provide the interpretation, again in writing. If the interpretation was not acceptable, then they could appeal it to the Planning Commission. This is the process that has occurred, and the appeal is before you now.

The interpretation that was given, was twofold: a definition of a fence, and then an interpretation of how that definition is used within the context of the Land Development and Planning Ordinance. The interpretation rendered is as follows:

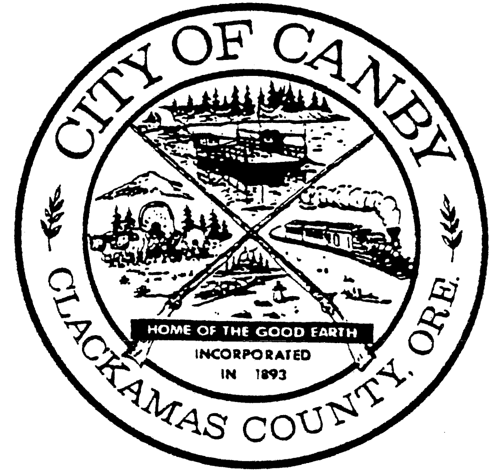
> An appropriate definition for a fence, according to staff's opinion is: "an enclosure, barrier, or boundary made of posts, boards, wire, stakes, or rails" (The American Heritage Dictionary, 1976 edition). As staff interprets Section 16.08.110 of the Land Development and Planning Ordinance (the section regulating the height and location of fences), a fence is a manmade barrier erected for the purposes of marking a boundary, or preventing escape or intrusion. Specific designs or types of fences are not regulated, only the location and height. Thus, an arbor trellis that is a part of the structure that marks a boundary, or prevents escape or intrusion, is a fence.

Staff does not wish to argue whether or not the fence, as it has been built, is aesthetically pleasing or not. The question that probably most specifically needs to be answered is: "Is an arbor trellis a part of a fence, if it is structurally attached?"

Hedges of one sort or another, have not been considered to be a fence, and therefore are not regulated in height (except for the vision clearance area, which is not an issue in this case). There may well be many fences within the city limits that, in one way or another, violate the ordinance. As these violations are brought to the City's attention, they are dealt with. To staff's knowledge, there has been no previous interpretation that permits fences to be higher than 3-1/2 feet in the street yard setback, including an arbor trellis attachment. If an arbor trellis is acceptable, are there other variations that are also acceptable? If staff's interpretation is overturned, please provide, as clearly and comprehensively as possible, a suitable replacement.

Photos are available of other properties with fence height restriction violations. Mr. Berge will be needed to help explain the violation in some of the pictures, as it is unclear to staff. No addresses were given for the locations of the violations.

Exhibits:
1. Notice of appeal date before the Planning Commission
2. Letter of Appeal
3. Interpretation Letter
4. Request for Interpretation



December 15, 1995

David M. Berge
Julie A. Buxton
1040 N. Birch St.
Canby, OR 97013

RE: Appeal of Staff Interpretation

Dear Mr. Berge:

The appeal of staff's interpretation of fencing requirements is being processed. The matter will be scheduled before the Planning Commission at the January 8, 1996 meeting. I will be forwarding a staff report to the Planning Commission on December 29, 1995. In your appeal letter you mention photos that you would like to show the Planning Commission. It will be helpful to me, in writing a staff report that best represents all sides of the issue, if you could submit the photos to this office prior to December 28, 1995. Any photos that are submitted as evidence, either before or at the hearing are required to be retained. So if you want to retain the photos, please submit copies. A copy of the staff report, when it is prepared will be sent to you (prior to the Planning Commission meeting of January 8, 1996).

Please feel free to contact me at [503] 266-4021 if you have any other questions, or if I can be of further assistance.

Sincerely,

James S Wheeler

James S. Wheeler
Assistant City Planner

cc: Mike Jordan, City Administrator
John Kelley, City Attorney
Gary Spanovich, City Planner
Steve Floyd, Code Enforcement Officer

RECEIVED

DEC 1 4 1995

CITY OF CANBY

December 13, 1995

City of Canby
City Planning Commission
Dear Sirs:

My wife, daughter and I are new residents of Canby. We purchased and moved into our new home at 1040 N. Birch St. this last July.

We hired Mr. Weigel of Weigel Decking and Remodeling to erect a fence on our property after seeing his display at the Clackamas County Fair. Mr. Weigel checked at Canby City Hall before starting construction and was told that although no inspection or permit was required for fences, there was a required setback. At Mr. Weigel's suggestion, and after I had noticed several houses in town with arbor trellises above the front yard fences, I requested an arbor be built above our fence so that I could plant climbing roses and other [illegible] plants.

Several days after the completion of the fence and arbor, the city's Code Enforcement Officer Steven [illegible] informed me in a telephone conversation that our fence was in violation of city code as it was more than three and one half feet high.

On November 2[illegible] I wrote to Mr. Jim Wheeler of the Canby Planning Department to ascertain if in fact we were in violation of the city code and to secure his interpretation of what he considered a fence. He informed me in a return letter dated November 28 that there was neither an [illegible] definition nor regulation regarding types and designs of fences. He also gave me a definition from The American Heritage Dictionary and said upon inspection he believed our fence and arbor trellis did violate the code.

We disagree and would like to appeal this ruling before the Planning Commission.

We submit that our fence is three and one half feet high in the front yard. The arbor addition on top the fence is not a fence. It does not hinder or block view. The arbor trellis does not mark our property nor prevent escape or intrusion. It is not intended in any way to wall off or hide our property from our neighbors but merely to enhance the fence and our property's appearance.

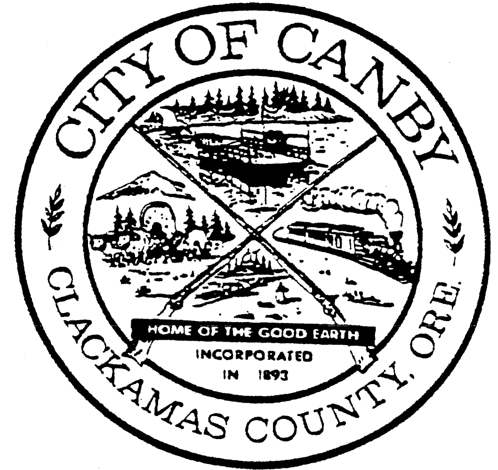
We submit that there are other fences with arbors in the front yards of several properties in Canby that have obviously existed for some time.

We further submit that there are other fences within Canby city limits and even on N. Birch St. both of wooden construction and of vegetation either in the front yards or in the side yards but extending to the front sidewalks that are higher than three and one half feet... some much higher and far more solid in appearance than our fence with its arbor.

We would like to meet with the City Planning Commission to show photographs of our property before and after construction, examples of fences and fences with arbors to be found in Canby, and to further explore our options in this matter.

Respectfully,

David M Berge
Julie A. Buxton



November 28, 1995

David M. Berge
Julie A. Buxton
1040 N. Birch St.
Canby, OR 97013

RE: Interpretation of "Fence" definition/requirements

Dear Mr. Berge:

It appears that some form of misunderstanding and/or miscommunication has occurred between the City and Mr. Weigel, your fencing contractor, regarding fencing requirements. I do not wish to speculate or attempt to recreate previous discussions in order to find out where "the blame" lies, even if it is to found only in one place. At this time, I assume that a proper and full flow of information did not occur between the City and Mr. Weigel. The fence setback that is referred to in your letter is most likely the location of your property line. Fences are permitted to be built up to your property line. The maximum height for a fence within the street yard setback (which is twenty (20) feet back from the street property line) is three and one-half (3-1/2) feet. It is this information that Mr. Weigel did not receive. The maximum height for a fence, other than the street yard setback, is six (6) feet. If your property line is eleven (11) feet behind the curb, the street yard setback for your property is thirty-one (31) feet behind the curb. It is within this area that the fence cannot be higher than three and one-half (3-1/2) feet. There are additional stipulations/conditions for corner lots which do not apply to your property.

An appropriate definition for a fence, according to staff's opinion is: "an enclosure, barrier, or boundary made of posts, boards, wire, stakes, or rails" (The American Heritage Dictionary, 1976 edition). As staff interprets Section 16.08.110 of the Land Planning and Development Ordinance (the section regulating the height and location of fences), a fence is a manmade barrier erected for the purposes of marking a boundary, or preventing escape or intrusion. Specific designs or types of fences are not regulated, only the location and height. Thus, an arbor trellis that is a part of the structure that marks a boundary, or prevents escape or intrusion, is a fence.

As you have described the structure along your street property line, including the arbor trellis, and upon visual inspection, staff's interpretation is that it is indeed a fence. As such, the maximum height that is permitted by ordinance (16.08.110), is three and one-half (3-1/2) feet, including the arbor trellis.

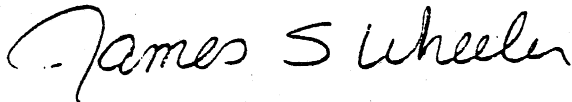
182 N. Holly P.O. Box 930 Canby, OR 97013 (503) 266-4021 FAX (503) 266-9316

This is an interpretation that has been made by staff. This interpretation can be appealed to the Planning Commission for their review. To do so, please submit in writing a request to appeal this interpretation to the Planning Commission. Please include the reasoning, or explanation, for the appeal request. Upon receipt of such a request, the matter will be scheduled for the next available public hearing. This process normally takes approximately four to six weeks.

I understand that this is a matter that the City's Code Enforcement Officer, Steve Floyd, has been pursuing. While this issue of interpretation is being pursued, that enforcement will be suspended. If a letter requesting an appeal of staff's interpretation of the City's fencing requirements, as it has been presented in this letter, is not submitted to the City by December 20, 1995, staff's interpretation will be considered to be acceptable and the enforcement proceedings will be continued.

Please feel free to contact me at [503] 266-4021 if you have any other questions, or if I can be of further assistance.

Sincerely,



James S. Wheeler
Assistant City Planner

cc: Mike Jordan, City Administrator
John Kelley, City Attorney
Gary Spanovich, City Planner
Steve Floyd, Code Enforcement Officer

November 21, 1995

RECEIVED
NOV 2 8 1995
CITY OF CANBY

Jim Wheeler
Asst City Planner
Canby Planning Department

Dear Mr. Wheeler:

My wife, daughter and I are new residents of Canby. We purchased and moved into our new home at 1040 N. Birch St. this last July.

On August 22, after seeing his display at the Clackamas County Fair, I hired Mr. Richard Weigel of Weigel Decking and Remodeling to build a fence on our property at 1040 N. Birch St.

We agreed that he would build a six foot high solid board fence in the back and side yards, and a three and one half foot slatted board fence in front. At Mr. Weigel's suggestion, and after I had noticed several houses around Canby with arbors above the front yard fences, I requested an arbor be built so that I could plant some climbing roses and other decorative plants.

Mr. Weigel went to the Canby City Hall the next day to check all pertinent city ordinances and was informed that although neither permits nor inspections were required for fences, there was an eleven foot setback from the street mandated by city code.

Our neighbors across the street, others to the north and south along N. Birch St. as well as some others not even living on Birch have made a point of stopping by to express how much they liked the fence and arbor.

Several days after the fence and arbor's completion, we found a business card on our front door left by an Officer Steven Floyd. He informed me by telephone conversation that our new fence was in violation of a city code as it was higher than three and one half feet .

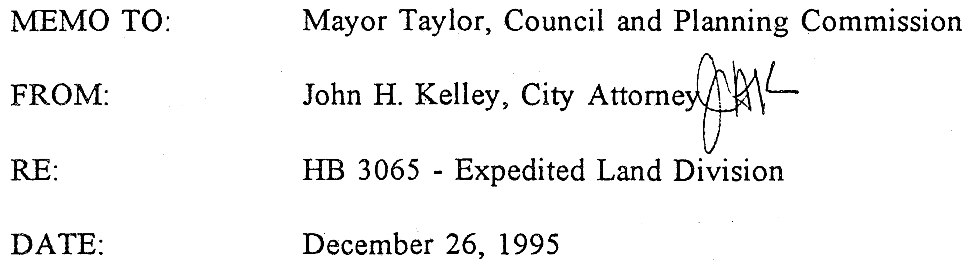
On November 18, we received a letter from Officer Floyd informing us that we had until December 15 to cut our fence down or stand liable for a fine. Obviously there is a difference in Officer Floyd's and our interpretation of what constitutes a fence.

Therefore we are writing to you to inquire what exactly constitutes a fence according to the Canby Planning Department. Is there some city ordinance that Mr. Weigel missed when he was at City Hall last September? Any help you can give us in this matter would be appreciated.

Respectfully,

David M Berge
Julie A Buxton

David M. Berge
Julie A. Buxton
1040 N. Birch St.
236-2312


MEMO TO: Mayor Taylor, Council and Planning Commission

FROM: John H. Kelley, City Attorney

RE: HB 3065 - Expedited Land Division

DATE: December 26, 1995

The last Legislature passed HB 3065 which deals in part with a new procedure for dealing with land divisions. (i.e., subdivisions and major/minor partitions.)

I have attached a copy of the relevant sections from HB 3065 that explain (?) the new procedure for your review (Exhibit "A"). You probably need to read it 3 or 4 times to understand it. It is very confusing and a substantial change from the way we've dealt with certain types of land division in the past.

I recently attended a land use seminar discussing the new legislation and rather than re-write the material I was given, I'm enclosing a copy of a memo from anther City Attorney that was handed out explaining the procedure for expedited land development applications (Exhibit "B").

The new law (HB 3065) requires an application fee be established by January 7, 1996, for such applications (Section 11 of HB 3065). For that reason, we are including a Resolution establishing Land Use Fees for expedited land development applications and appeals of same. Jim Wheeler has reviewed the matter and made a recommendation to me regarding the amount of the fee. Please see his attached memo, as well (Exhibit "C").

While staff is in the process of developing a procedure to deal with these applications, we do need direction from the Council as to which job description or body of individuals is to review and decide the application initially. Your choices include the Planning Director, the Planning Commission or the City Council. One of the three needs to be designated as the "local government" authority to make the decisions to approve or deny as required in Section 8 (4)(b) of HB 3065.

Once staff knows which authority will be making the decisions, we can put together a policy for dealing with these applications. We also must hire an independent person to act as a referee for appeals from the body chosen to make the decisions in expedited matters under Section 10 of HB 3065. We are currently checking on people that might be available and willing to assume that position.

Exhibit "A"

1 197.195.

2 (b) Whenever the findings are defective because of failure to recite adequate facts or legal
3 conclusions or failure to adequately identify the standards or their relation to the facts, but the
4 parties identify relevant evidence in the record which clearly supports the decision or a part of the
5 decision, the board shall affirm the decision or the part of the decision supported by the record and
6 remand the remainder to the local government, with direction indicating appropriate remedial
7 action.

8 [*(10)*] (12) The board may reverse or remand a land use decision under review due to ex parte
9 contacts or bias resulting from ex parte contacts with a member of the decision-making body, only
10 if the member of the decision-making body did not comply with ORS 215.422 (3) or 227.180 (3),
11 whichever is applicable.

12 [*(11)*] (13) Subsection [*(10)*] (12) of this section does not apply to reverse or remand of a land
13 use decision due to ex parte contact or bias resulting from ex parte contact with a hearings officer.

14 [*(12)*] (14) The board shall reverse or remand a land use decision or limited land use decision
15 which violates a commission order issued under ORS 197.328.

16 [*(13)*] (15) In cases in which a local government provides a quasi-judicial land use hearing on a
17 limited land use decision, the requirements of subsections [*(10)*] (12) and [*(11)*] (13) of this section
18 apply.

19 **(16) The board may decide cases before it by means of memorandum decisions and shall**
20 **prepare full opinions only in such cases as it deems proper.**

21 **(17) Absent a demonstration of substantial prejudice to the petitioner, a violation of a**
22 **provision of ORS 197.763 shall not be a basis for reversal or remand.**

23 **<u>SECTION 6.</u> Sections 7 to 11 and 15 of this Act are added to and made a part of ORS**
24 **chapter 197.**

25 **<u>SECTION 7.</u> (1) An expedited land division:**

26 **(a) Is an action of a local government that:**

27 **(A) Includes land that is zoned for residential uses and is within an urban growth**
28 **boundary.**

29 **(B) Is solely for the purposes of residential use, including recreational or open space uses**
30 **accessory to residential use.**

31 **(C) Does not provide for dwellings or accessory buildings to be located on land that is**
32 **specifically mapped and designated in the comprehensive plan and land use regulations for**
33 **full or partial protection of natural features under the statewide planning goals that protect:**

34 **(i) Open spaces, scenic and historic areas and natural resources;**

35 **(ii) The Willamette River Greenway;**

36 **(iii) Estuarine resources;**

37 **(iv) Coastal shorelands; and**

38 **(v) Beaches and dunes.**

39 **(D) Satisfies minimum street or other right-of-way connectivity standards established by**
40 **acknowledged land use regulations or, if such standards are not contained in the applicable**
41 **regulations, as required by statewide planning goals or rules.**

42 **(E) Creates enough lots or parcels to allow building residential units at 80 percent or**
43 **more of the maximum net density permitted by the zoning designation of the site.**

44 **(b) Is a land division that:**

45 **(A) Will create three or fewer parcels under ORS 92.010; and**

44

1 (B) Meets the criteria set forth for an action under paragraph (a)(A) to (D) of this sub-
2 section.
3 (2) An expedited land division as described in this section is not a land use decision or a
4 limited land use decision under ORS 197.015 or a permit under ORS 215.402 or 227.160.
5 (3) The provisions of sections 7 to 11 of this 1995 Act apply to all elements of a local
6 government comprehensive plan and land use regulations applicable to a land division, in-
7 cluding any planned unit development standards and any procedures designed to regulate:
8 (a) The physical characteristics of permitted uses;
9 (b) The dimensions of the lots or parcels to be created; or
10 (c) Transportation, sewer, water, drainage and other facilities or services necessary for
11 the proposed development, including but not limited to right-of-way standards, facility di-
12 mensions and on-site and off-site improvements.
13 (4) An application to a local government for an expedited land division shall describe the
14 manner in which the proposed division complies with each of the provisions of subsection (1)
15 of this section.
16 <u>SECTION 8.</u> When requested by an applicant for an expedited land division, in lieu of the
17 procedure set forth in its comprehensive plan and land use regulations, the local government
18 shall use the following procedures for an expedited land division under section 7 of this 1995
19 Act:
20 (1)(a) If the application for expedited land division is incomplete, the local government
21 shall notify the applicant of exactly what information is missing within 21 days of receipt of
22 the application and allow the applicant to submit the missing information. For purposes of
23 computation of time under this section, the application shall be deemed complete on the date
24 the applicant submits the requested information or refuses in writing to submit it.
25 (b) If the application was complete when first submitted or the applicant submits the
26 requested additional information within 180 days of the date the application was first sub-
27 mitted, approval or denial of the application shall be based upon the standards and criteria
28 that were applicable at the time the application was first submitted.
29 (2) The local government shall provide written notice of the receipt of the completed
30 application for an expedited land division to any state agency, local government or special
31 district responsible for providing public facilities or services to the development and to
32 owners of property within 100 feet of the entire contiguous site for which the application is
33 made. The notification list shall be compiled from the most recent property tax assessment
34 roll. For purposes of appeal to the referee under section 10 of this 1995 Act, this requirement
35 shall be deemed met when the local government can provide an affidavit or other certif-
36 ication that such notice was given. Notice shall also be provided to any neighborhood or
37 community planning organization recognized by the governing body and whose boundaries
38 include the site.
39 (3) The notice required under subsection (2) of this section shall:
40 (a) State:
41 (A) The deadline for submitting written comments;
42 (B) That issues that may provide the basis for an appeal to the referee must be raised
43 in writing prior to the expiration of the comment period; and
44 (C) That issues must be raised with sufficient specificity to enable the local government
45 to respond to the issue.

45

1 (b) Set forth, by commonly used citation, the applicable criteria for the decision.
2 (c) Set forth the street address or other easily understood geographical reference to the
3 subject property.
4 (d) State the place, date and time that comments are due.
5 (e) State a time and place where copies of all evidence submitted by the applicant will
6 be available for review.
7 (f) Include the name and telephone number of a local government contact person.
8 (g) Briefly summarize the local decision-making process for the expedited land division
9 decision being made.
10 (4) After notice under subsections (2) and (3) of this section, the local government shall:
11 (a) Provide a 14-day period for submission of written comments prior to the decision.
12 (b) Make a decision to approve or deny the application within 63 days of receiving a
13 completed application, based on whether it satisfies the substantive requirements of the local
14 government's land use regulations. An approval may include conditions to ensure that the
15 application meets the applicable land use regulations. For applications subject to this sec-
16 tion, the local government:
17 (A) Shall not hold a hearing on the application; and
18 (B) Shall issue a written determination of compliance or noncompliance with applicable
19 land use regulations that includes a summary statement explaining the determination. The
20 summary statement may be in any form reasonably intended to communicate the local gov-
21 ernment's basis for the determination.
22 (c) Provide notice of the decision to the applicant and to those who received notice under
23 subsection (2) of this section within 63 days of the date of a completed application. The notice
24 of decision shall include:
25 (A) The summary statement described in paragraph (b)(B) of this subsection; and
26 (B) An explanation of appeal rights under section 10 of this 1995 Act.
27 <u>SECTION 9.</u> (1) Except as provided in subsection (2) of this section, if the local govern-
28 ment does not make a decision on an expedited land division within 63 days after the appli-
29 cation is deemed complete, the applicant may apply in the circuit court for the county in
30 which the application was filed for a writ of mandamus to compel the local government to
31 issue the approval. The writ shall be issued unless the local government shows that the ap-
32 proval would violate a substantive provision of the applicable land use regulations or the re-
33 quirements of section 7 of this 1995 Act. A decision of the circuit court under this section
34 may be appealed only to the Court of Appeals.
35 (2) After seven days' notice to the applicant, the governing body of the local government
36 may, at a regularly scheduled public meeting, take action to extend the 63-day time period
37 to a date certain for one or more applications for an expedited land division prior to the ex-
38 piration of the 63-day period, based on a determination that an unexpected or extraordinary
39 increase in applications makes action within 63 days impracticable. In no case shall an ex-
40 tension be to a date more than 120 days after the application was deemed complete. Upon
41 approval of an extension, the provisions of sections 7 to 11 of this 1995 Act, including the
42 mandamus remedy provided by subsection (1) of this section, shall remain applicable to the
43 expedited land division, except that the extended period shall be substituted for the 63-day
44 period wherever applicable.
45 (3) The decision to approve or not approve an extension under subsection (2) of this

46

1 government for any reason other than as set forth in this subsection.
2 (5) Unless the governing body of the local government finds exigent circumstances, a
3 referee who fails to issue a written decision within 42 days of the filing of an appeal shall
4 receive no compensation for service as referee in the appeal.
5 (6) Notwithstanding any other provision of law, the referee shall order the local govern-
6 ment to refund the deposit for costs to an appellant who materially improves his or her po-
7 sition from the decision of the local government. The referee shall assess the cost of the
8 appeal in excess of the deposit for costs, up to a maximum of $500, including the deposit paid
9 under subsection (1) of this section, against an appellant who does not materially improve
10 his or her position from the decision of the local government. The local government shall
11 pay the portion of the costs of the appeal not assessed against the appellant. The costs of
12 the appeal include the compensation paid the referee and costs incurred by the local gov-
13 ernment, but not the costs of other parties.
14 (7) The Land Use Board of Appeals does not have jurisdiction to consider any decisions,
15 aspects of decisions or actions made under sections 7 to 11 of this 1995 Act.
16 (8) Any party to a proceeding before a referee under this section may seek judicial review
17 of the referee's decision in the manner provided for review of final orders of the Land Use
18 Board of Appeals under ORS 197.850 and 197.855. The Court of Appeals shall review decisions
19 of the referee in the same manner as provided for review of final orders of the Land Use
20 Board of Appeals in those statutes. However, notwithstanding ORS 197.850 (9) or any other
21 provision of law, the court shall reverse or remand the decision only if it finds:
22 (a) That the decision does not concern an expedited land division as described in section
23 7 of this 1995 Act and the appellant raised this issue in proceedings before the referee;
24 (b) A basis to reverse or remand the decision described in ORS 36.355 (1); or
25 (c) That the decision is unconstitutional.
26 SECTION 11. Within 120 days of the effective date of this 1995 Act, each city and county
27 shall establish an application fee for an expedited land division. The fee shall be set at a level
28 calculated to recover the estimated full cost of processing an application, including the cost
29 of appeals to the referee under section 10 of this 1995 Act, based on the estimated average
30 cost of such applications. Within one year of establishing the fee required under this section,
31 the city or county shall review and revise the fee, if necessary, to reflect actual experience
32 in processing applications under this 1995 Act.
33 SECTION 12. ORS 215.402 is amended to read:
34 215.402. As used in ORS 215.402 to 215.438 unless the context requires otherwise:
35 (1) "Contested case" means a proceeding in which the legal rights, duties or privileges of spe-
36 cific parties under general rules or policies provided under ORS 215.010 to 215.213, 215.215 to
37 215.263, 215.283 to 215.293, 215.317, 215.327 and 215.402 to 215.438, or any ordinance, rule or regu-
38 lation adopted pursuant thereto, are required to be determined only after a hearing at which specific
39 parties are entitled to appear and be heard.
40 (2) "Hearing" means a quasi-judicial hearing, authorized or required by the ordinances and
41 regulations of a county adopted pursuant to ORS 215.010 to 215.213, 215.215 to 215.263, 215.283 to
42 215.293, 215.317, 215.327 and 215.402 to 215.438:
43 (a) To determine in accordance with such ordinances and regulations if a permit shall be
44 granted or denied; or
45 (b) To determine a contested case.

48

1 section is not a land use decision or limited land use decision.
2 SECTION 10. (1) An appeal of a decision made under sections 7 and 8 of this 1995 Act
3 shall be made as follows:
4 (a) An appeal must be filed with the local government within 14 days of mailing of the
5 notice of the decision under section 8 (4) of this 1995 Act, and shall be accompanied by a $300
6 deposit for costs.
7 (b) A decision may be appealed by:
8 (A) The applicant; or
9 (B) Any person or organization who files written comments in the time period established
10 under section 8 of this 1995 Act.
11 (c) An appeal shall be based solely on allegations:
12 (A) Of violation of the substantive provisions of the applicable land use regulations;
13 (B) Of unconstitutionality of the decision;
14 (C) That the application is not eligible for review under sections 7 to 11 of this 1995 Act
15 and should be reviewed as a land use decision or limited land use decision; or
16 (D) That the parties' substantive rights have been substantially prejudiced by an error
17 in procedure by the local government.
18 (2) The local government shall appoint a referee to decide the appeal of a decision made
19 under sections 7 and 8 of this 1995 Act. The referee shall not be an employee or official of
20 the local government. However, a local government that has designated a hearings officer
21 under ORS 215.406 or 227.165 may designate the hearings officer as the referee for appeals
22 of a decision made under sections 7 and 8 of this 1995 Act.
23 (3) Within seven days of being appointed to decide the appeal, the referee shall notify the
24 applicant, the local government, the appellant if other than the applicant, any person or or-
25 ganization entitled to notice under section 8 (2) of this 1995 Act that provided written com-
26 ments to the local government and all providers of public facilities and services entitled to
27 notice under section 8 (2) of this 1995 Act and advise them of the manner in which they may
28 participate in the appeal. A person or organization that provided written comments to the
29 local government but did not file an appeal under subsection (1) of this section may partic-
30 ipate only with respect to the issues raised in the written comments submitted by that per-
31 son or organization. The referee may use any procedure for decision-making consistent with
32 the interests of the parties to ensure a fair opportunity to present information and argu-
33 ment. The referee shall provide the local government an opportunity to explain its decision,
34 but is not limited to reviewing the local government decision and may consider information
35 not presented to the local government.
36 (4)(a) The referee shall apply the substantive requirements of the local government's land
37 use regulations and section 7 of this 1995 Act. If the referee determines that the application
38 does not qualify as an expedited land division as described in section 7 of this 1995 Act, the
39 referee shall remand the application for consideration as a land use decision or limited land
40 use decision. In all other cases, the referee shall seek to identify means by which the ap-
41 plication can satisfy the applicable requirements.
42 (b) The referee may not reduce the density of the land division application. The referee
43 shall make a written decision approving or denying the application or approving it with con-
44 ditions designed to ensure that the application satisfies the land use regulations, within 42
45 days of the filing of an appeal. The referee may not remand the application to the local

47

Exhibit "B"

House Bill 3065 (Expedited Land Divisions)

6. <u>**Sections 6 to 11 (Expedited Land Divisions)**</u>**:** These sections add an astonishing new land use procedure which requires the City to review and decide subdivision, partition and planned development applications within 63 days in certain circumstances. The bill severely restricts citizen input and right to appeal, and requires the City to hire an outside hearing referee to decide appeals. Appeal of a referee decision is solely to the Court of Appeals, on very limited grounds.

i. Section 6 adds the provisions to ORS Chapter 197.

ii. <u>Qualifying Applications:</u> Section 7 applies the process to the following land divisions:

a. Land division actions, including subdivisions (creation of four or more parcels) and planned developments of property within an urban growth boundary zoned for residential use that:

- is for the purpose of residential use, including recreational or open space use accessory to the residential use;
- Does not provide for dwellings to be sited on "mapped and designated" natural, historic or scenic areas, Willamette Greenway;
- Is designed to meet minimum street or other right-of-way connectivity standards of the local ordinance or Goal 12; and
- provides for *at least* 80% of the maximum net density allowed on the site.

b. Partitions that create three or fewer parcels and meet all of the criteria noted above, except the 80% density requirement.

The applicant is required to demonstrate that his or her application qualifies for an expedited land division.

iii. <u>Expedited Process:</u> Section 8 establishes a radical new process that expressly exempts "expedited land divisions" from local approval procedures "at the request of the applicant." Another words, if the applicant qualifies for an expedited land division, he or she is entitled to choose between the expedited process and the standard process. If the expedited process is chosen (and the applicant qualifies), that process trumps the local process. The expedited process is as follows:

a. Application; Completeness: Once an expedited application is submitted, the City has 21 days to determine whether or not the application is complete (the City has 30 days under the standard procedure). If the application is incomplete, the

Exhibit "B"

applicant has 180 days to file the additional information. The application is deemed complete once the additional information is submitted or the applicant submits a letter in writing refusing to submit the additional information. Once complete, the 63 day clock begins to tick (see discussion under section 9), but the application is judged pursuant to the standards and conditions in effect at the time of filing.

b. Notice of Application: The City must provide written notice of a complete application to any agency responsible for providing services to the development, to owners of property within 100 feet (the City's standard process requires notice to owners and residents with 300 feet), and to any neighborhood or community planning organization whose boundaries include the site (the City's standard process also includes homeowners associations). The notice must provide for a 14 day comment period prior to decision and otherwise is substantially similar to the notice required for minor developments under the current Code. See Section 8(3).

c. Decision: The City must make a decision to approve or deny the application within 63 days of receiving the a complete application. The decision must be based on whether it meets the "substantive requirements of the City's land use regulations" and may include conditions to ensure compliance. The City is expressly prohibited from holding a hearing on the applications. The decision must be in writing determining compliance or non-compliance with applicable criteria and include a summary statement explaining the decision "in any form reasonably intended to communicate the local government's basis for the decision." Although this appears to adopt a lesser standard for findings, Section 29 of the bill amends LOC 227.173 adds "expedited land divisions" to list of land use decisions for which findings are required.

d. Notice of Decision: The City must mail a copy of the summary decision to all parties entitled to notice of the application and also include an explanation of appeal rights (see discussion of Section 10, below).

iv. <u>The 63 Day Rule:</u> Section 9(1) established a new 63 day rule for local decision on the application. It is substantially similar to the 120 Day Rule, except that it only applies to the initial decision and not appeal to the hearings referee. If the City violates this standard, the applicant can go to circuit court and obtain a writ of mandamus forcing the City to approve the application unless the City can demonstrate that approval would violate a substantive provision of local land use regulations. Section 9(2) empowers the City Council, however, to extend the 63 day period to a date certain for one or more applications based upon a determination that an unexpected or extraordinary increase in applications makes action within 63 days impracticable. In no case may the extension be beyond 120 days. The decision to approve or not approve

Exhibit "B"

the extension is not a land use decision.

v. Hearings Officer Review; Appeal: Section 10 requires the City Council to appoint a hearings referee to decide appeals. Appeal of the hearings officers decision is directly to the Court of Appeals. LUBA is cut out of the process.

a. Filing an Appeal; Standing: An appeal must be filed within 14 days of mailing of the notice, and must be accompanied by a $300 deposit for costs (Unlike the City's current procedure, there is no waiver for neighborhood or homeowners associations). An appeal may be filed by the applicant or any person or organization who submitted comments during the comment period.

b. Scope of Appeal: The appeal must be based on an allegation that the decision does not comply with the City's land use regulations, is unconstitutional, should not have qualified as an expedited land use decision, or that he city made a procedural error that prejudiced a party's substantial rights.

c. Appointment of Hearings Referee: Section 10(2) mandates that the City appoint a hearings referee to decide the case. That referee may not be an employee or officer of the City (i.e., no staff person, no hearing body member and no City Councilor may serve as the referee), but may be a hearings officer as designated pursuant to ORS 227.165 (this section empowers the City Council to appoint a hearings officer to decide any and all land use applications).

d. Hearing Procedure: Within seven days of appointment, the referee must notify the applicant, the City and any person entitled to notice <u>and</u> who submitted written comments, of the manner in which they may participate. The referee is not required to hold an actual hearing. Rather, "the referee may use any procedure for decision making consistent with the interests of the parties to ensure a fair opportunity to present information and argument." Presumably, the process could be limited to a written procedure. The referee must provide the city with the opportunity to explain its decision, but is not limited to the record. New argument and evidence may be submitted, except that persons who submitted comments but are not appellants are limited to the issues raised in their written comments before the City. Other persons may not participate in the hearing.

e. Referee Decision: The Referee shall apply the local code and must approve, approve with conditions or deny the application. The Referee may only remand the decision if he or she finds that the application does not qualify as an "expedited land division." In addition, the referee is prohibited from reducing density, and

Exhibit "B"

is directed to "seek to identify means by which the application can satisfy the applicable requirements." In other words, the referee is statutorily required to prefer approval at the requested density if at all possible under the local regulations. The Referee is required to render his or her decision in writing within 42 days of the filing of the appeal. If he or she does not, the local government is not required to pay any compensation for service.

f. Costs: If the appellant "materially improves his or her position from the decision of the local government," the referee is required to order the City to refund the deposit for costs. If the appellant does not materially improve his or her position, the referee shall require the appellant to pay the City's costs of the appeal, up to a maximum of $500 (including the deposit). The City has to pick up the rest of the tab (but see the discussion of fees under section 11, below). Costs that may be assessed include the referee's compensation and the city's costs but not the costs of the other parties.

g. Further Appeal: A party must appeal the referee's decision directly to the Oregon Court of Appeals in the same manner as an appeal from LUBA. The Court of Appeals, however, may only reverse or remand the decision if it did not qualify as an expedited land use decision, the decision is unconstitutional or for any of the reasons described in ORS 36.366(1). This statute governs appeal of arbitrator awards; it only allows such awards to be overturned based on abuse of authority, abuse of process or conflict of interest, a very tough standard of review to overcome. Simply being wrong is not a good enough reason for overturning the referee's decision.

vi. <u>Fees.</u> Section 11 requires every city and county to establish a fee for expedited land divisions within 120 days of the effective date of the statute (January 7, 1996). The fee must be set at the level of the "estimated <u>full</u> cost of processing an application," including the cost of appeals to the referee, based upon the estimated average cost of such applications. After a year, the local government must adjust the fee based upon actual experience.

\- <u>Impact on City</u>: As noted above, the "expedited land division" is mandatory and expressly supersedes the local code. It is therefore neither necessary nor appropriate to incorporate the state law into the Development Code. The City should, however, immediately begin calculating the fee and contracting with a person or developing a list of persons who can serve as hearings referees. This will at least initially require allocation of additional funds, pending receipt of funds through the fee structure. (Nothing in the law prohibits the City from appointing a volunteer as referee, but given the amount of work the referee is required to do - giving notice, scheduling the "hearing" and

Exhibit "B"

issuing a written decision - this may not be practicable. In addition, the nature of the job almost certainly require a lawyer, or an experienced planner well versed in land use law.)

For the longer term, the City may want to take a close look at its approval criteria for partitions, subdivisions and planned developments, many of which are vague and/or subjective. Given that the hearings referee is statutorily required to prefer approval, and given that review of the referee's decision is so limited, the City may wish to clarify and objectify the criteria for approval.

7. Sections 12 to 14 make minor conforming amendments to state law.

8. **Section 15 ("Refinement Plans"):** This section empowers the city to adopt a "refinement plan" for a neighborhood or community within its jurisdiction and inside the urban growth boundary. A "refinement plan" is more detailed than a comprehensive plan, applies to a specific area, must address a number of criteria, including minimum and maximum density and FAR. The Kicker: Once adopted, the expedited land division process applies to almost all the land use applications in the area subject to the plan.

- Impact on City: This section is optional. The "refinement plan" is, however, similar in many respects to the City's "neighborhood plans." If the City desired to expand the expedited land division process in these areas, it would be relatively easy to do so, except that the City would be required to impose a minimum density. If the City does not wish to apply the expedited process, the City should probably specifically state in the adopting document that the neighborhood plan is not a "refinement plan" subject to this section.

9. The remainder of the bill contains conforming amendments in other sections of ORS to implement the changes noted above.

II. SB 568 (1995 Or. Laws Chapter 692) - Appeal Fees.

This bill amends ORS 227.175(10)(b) to raise the maximum amount of the appeal fee that the City can charge for appeal of a staff decision to a hearing body from $100 to $250. It retains the exemption from this fee for neighborhood associations but eliminate the exemption for LCDC.

- Impact on City: This bill allows but does not require the City to increase the fee. Increasing the fee would allow the City to recover more of its costs for appeals of staff decisions.

III. SB 245 (1995 Or. Laws Chapter 812) (attached as Exhibit 2) - 120 Day Rule.

Exhibit "B"

demonstration of substantial prejudice to the petitioner, a violation of ORS 197.763 is not a basis for reversal or remand by LUBA.

Expedited Land Divisions

Sections 6–15 of HB 3065 establish a new, expedited land division procedure at the local level for a certain class of residential development. Section 9 of the bill provides that these land divisions are neither land use decisions nor limited land use decisions. Appeals are therefore to the court of appeals, not LUBA.

An expedited land division as defined in HB 3065, §7, involves land within an urban growth boundary, and must include at least some land zoned for residential use. The division must be solely for residential development, including recreational or open space that is accessory to residential uses. It must meet certain street connectivity standards as established by acknowledged local regulations or by statewide goal or rule. It may not locate dwellings or accessory buildings on land that is mapped and designated for full or partial protection of open space, the Willamette River Greenway, estuarine resources, coastal shorelands, or beaches and dunes. It must either create enough lots or parcels to allow building at 80% or more of the maximum net density permitted by the zoning designation of the site, or create three or fewer parcels under ORS 92.010.

Section 8 of HB 3065 provides that if a proposed development meets these criteria, the developer may choose whether to have the procedures for an expedited land division apply. If so, the expedited procedures apply to decision making on all plan provisions and regulations applicable to the land division, including dimensions of the lot and public facilities and services for the proposed development.

Section 8 also provides that if the application is incomplete, the local government must inform the applicant, within 21 days of receiving the application, of exactly what information is missing and must allow the applicant to submit that information. The local government must provide notice to owners of property within 100 feet of the site, to public service providers, and to recognized neighborhood associations or community planning organizations. Fourteen days must be provided for written comments. The initial decision must be made administratively, without holding a hearing, within 63 days of receiving a completed application. The local government must issue a written determination and include a "summary statement" of explanation. If the decision is not made within 63 days, the applicant may apply in circuit court for a writ of mandamus. The writ must issue unless the approval would violate a substantive provision of the applicable land use regulations, or unless the proposal did not meet the criteria defining an expedited land division.

Section 9 of HB 3065 sets forth the procedure by which the 63-day deadline may be extended. After seven days' notice to the applicant, the governing body of the local government, at a regularly scheduled public meeting, may extend the 63-day period to a date certain if it determines that an unexpected or

Exhibit "B"

extraordinary increase in applications makes action within 63 days impracticable. The extension cannot be to a date more than 120 days after the application was deemed complete.

Section 10 of HB 3065 provides that the only local appeal of the decision is to a "referee." The referee can be a local hearings officer, but cannot otherwise be an employee or official of the local government.

> NOTE: This appeal presents the only opportunity for a local, public hearing on the application.

Those who commented during the 14-day comment period and the applicant have standing to appeal. However, the local government, the applicant, and those who provided comments during the comment period may participate in the appeal. Those who provided comments but did not appeal may participate in the appeal only with respect to the issues raised in their previously submitted written comments.

The appellant must pay a $300 deposit for costs. An appellant that "materially improves" his or her position before the referee is refunded the $300. An appellant who does not materially improve from the original position is assessed the cost of the appeal up to a maximum of $500.

The referee holds an essentially de novo hearing. The referee may remand the application only if it does not meet the definitional criteria for an expedited land division. In all other cases, the referee is charged with "identify[ing] means by which the application can satisfy the applicable regulations." HB 3065, §10. The referee must approve the application, deny it, or approve it with conditions, but may not reduce the density of the proposed development. The referee must issue a written decision within 42 days after the appeal is filed. A referee who fails to issue a determination within the 42-day time period will not be paid for service as a referee, unless the governing body finds that "exigent circumstances" exist. HB 3065, §10(5).

The court of appeals, not LUBA, has jurisdiction over an appeal of the referee's decision. The grounds for an appeal are very limited. The court of appeals can reverse or remand the decision only if (1) it does not concern an expedited land division as defined, (2) it is unconstitutional, or (3) there was misconduct or fraud in the decision (as defined in ORS 36.355(1)).

Within 120 days of the effective date of HB 3065, all local governments must establish an application fee for an expedited land division. The fee must be calculated to recover the full cost of processing the application, including the cost of appeals. The fee must be reviewed within one year.

Refinement Plans and Expedited Land Divisions

Section 15 of HB 3065 defines the term *refinement plan,* which is a plan for a community or neighborhood that is more detailed than a comprehensive plan. A refinement plan establishes density ranges, including minimum and maximum densities, for residential development in the area. It specifies minimum and

-MEMORANDUM-

Exhibit "C"

TO:	***John Kelley, City Attorney***
FROM:	***James S. Wheeler, Assistant City Planner*** JSW
DATE:	***December 26, 1995***
RE:	***House Bill 3605, Expedited Land Division Fee***

The fee that planning staff is recommending is $1400.00 plus $30.00 per lot for the Expedited Land Division application fee and a $300.00 deposit for the appeal of an Expedited Land Division application. In your memo to the Council, you may want to include the "justification" for these amounts. The cost for processing an expedited land division application will be approximately the same as the cost for a non-expedited subdivision or minor/major land partition in that the notification, staff report, hearing body (even if it isn't a "public hearing") requirements are similar in the amount of staff work required. Therefore, the cost are similar, and that is the basis for the recommended application fee. The fee is actually $500.00 higher than that for a non-expedited subdivision application, and this is due to the requirement H.B. 3065 places on the fee structure to include the cost of appeal. The cost of appeal was determined by the maximum amount of cost that can be charged by the appeal officer. The $300.00 deposit for an appeal of an Expedited Land Division application is mandated by H.B. 3065.

RESOLUTION NO. 600

A RESOLUTION ESTABLISHING LAND USE FEES

WHEREAS, the Canby City Council has prescribed, by City Code Section 16.88.030, that Land Use applications and fees shall be set and approved by resolution by City Council; and

WHEREAS, the Canby City Council has determined that the fees hereinafter specified are just, reasonable and necessary; and

WHEREAS, Oregon law requires that a governing body, when adopting a new fee resolution imposing new rates, may include a provision classifying said fees as subject to or not subject to the limitations set in Section 11(b), Article XI of the Oregon Construction, now therefore, it is hereby

RESOLVED that effective immediately, fees to be charged for Land Development and Planning Application processing are established as set forth in Exhibit "A" and attached hereto, and by this reference incorporated herein.

BE IT FURTHER RESOLVED that the Canby City Council hereby classifies the fees imposed herein as not subject to the limitations imposed by Section 11(b), Article XI of the Oregon Constitution and that the City Recorder is hereby directed to publish a notice in accordance with Oregon law.

ADOPTED by the Canby City Council at a regular meeting on the 3rd day of January, 1996.

Scott Taylor, Mayor

Marilyn K. Perkett, City Recorder

EXHIBIT "A"

PROPOSED LAND USE FEES

1.	*Major or Minor Land Partition*	*$900*
2.	*Subdivision*	*$900+$30/lot*
3.	*Condominium Projects of Six or Fewer Units*	*$100*
4.	*Condominium Conversion or Construction of Seven or More Units*	*$600+$20/unit* *$900+$30/unit*
5.	*Conditional Use Permit*	*$900*
6.	*Variance*	*$900*
7.	*Expansion of Nonconforming Use or Structure*	*$100***
8.	*Zone Change*	*$1500*
9.	*Annexation*	*$1500*
10.	*Appeal of Planning Commission Decision*	*$600**
11.	*Lot Line Adjustment*	*$100***
12.	*Hardship Permit for Mobile Home or Travel Trailer*	*$100***
13.	*Comprehensive Plan Amendment*	*$1500*
14.	*Amendment to the Text of the Land Development & Planning Ord.*	*$1500****
15.	*Site and Design Review*	*$750*
16.	*Signs*	*$25*
17.	*Expedited Land Division*	*$1400+$30/lot*
18.	*Expedited Land Division Appeal Deposit*	*$300*

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* *In any case where the preparation (copying, duplication, or tapes, etc.) of the record of the Planning Commission results in costs to the City beyond the $600 filing fee, the City Planner may invoice the appellant and may establish a deadline by which such amount is to be paid. Failure to pay the required amount shall cause the appeal to be denied.*

** *Plus an additional $600 if scheduled for public hearing.*

*** *Plus an additional $600 if the amendment includes concurrent changes to the Comprehensive Plan.*

STOEL RIVES

ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380
Fax (503) 220-2480
TDD (503) 221-1045

December 11, 1995

MICHAEL C. ROBINSON
Direct Dial
(503) 294-9194

VIA MESSENGER
Mr. Jim Wheeler
Assistant Planner
City of Canby Planning Department
182 North Holly
PO Box 930
Canby OR 97013

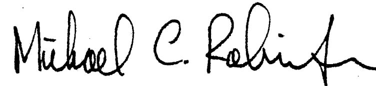
Re: Appeal of Planning Commission Decision in DR 94-11A

Dear Mr. Wheeler:

I represent Mr. Kevin Howard, the applicant in this matter. Pursuant to Canby Zoning Ordinance ("CZO") 16.88.140(B), I am filing an appeal of the Planning Commission's decision denying Mr. Howard's application. Enclosed with this appeal is a check in the amount of $600 made to the City of Canby for the appeal fee, and a narrative addressing the standards and criteria for an appeal from a Planning Commission decision to the City Council pursuant to CZO 16.88.140(C).

Please provide me with notice of the City Council appeal hearing date.

Very truly yours,



Michael C. Robinson

MCR:sak
Enclosures
cc: Mr. Kevin Howard (w/encl)

PDX1A-13087.1 17589 0001

BEFORE THE CITY COUNCIL OF THE CITY OF CANBY

IN THE MATTER OF AN APPLICATION BY KEVIN HOWARD FOR MODIFICATION TO A DESIGN REVIEW PERMIT APPROVAL	))))	APPEAL OF THE PLANNING COMMISSION DECISION DR 94-11A

1. The Planning Commission considered this application on November 13, 1995. The Planning Commission adopted written findings on November 27, 1995. Pursuant to Canby Zoning Ordinance ("CZO") 16.88.140(B), this appeal is timely filed on December 11, 1995 (within 15 days after the Planning Commission has rendered its decision by filing written notice with the City Planner).

2. The nature of the decision being appealed is a design review decision denying Mr. Howard's request to construct a yellow sign.

3. The City Council should reverse the decision of the Planning Commission and approve the application for the reasons shown below.

A. **No Amendment to DR 94-11A Is Required to Change the Color of the Sign.**

CZO 16.49.030(2)(A), "Site and Design Review Plan Approval Required," provides as follows:

> **"The following are exempt from site and design review:**
>
> **"A. Signs that are not part of a reviewable development project."**

A reviewable development project is one that is required to obtain design review approval. Condition of approval 11 in DR 94-11 provides as follows:

> **"Total signage for the property shall be no more than 600 square feet. The total signage within the first six months after occupancy is limited to a sign that is similar in size and appearance as the one shown in the picture submitted with the application. The picture is in the file."**

The mini-storage project has been occupied since May 1995. The six-month period referred in condition of approval 11 expired in November 1995. Condition of approval 11 does not require that a sign be installed during the six months but simply provides that if a sign is installed in the first six months, it must be "similar in size and appearance as the one shown in the picture submitted with the application." Consistent with CZO 16.49.030(2)(A), after the six-month period, Mr. Howard may install any sign without design review pursuant to CZO 16.49.

Because the six-month period referred to in condition of approval 11 has expired and the sign is not otherwise part of a "reviewable development project," Mr. Howard is not required to obtain design review approval for a yellow sign.

B. The Planning Commission Erred by Considering Ex Parte Contacts in its Findings.

ORS 227.180(3)(b) requires that Planning Commission members make a public announcement of the content of an ex parte communication and announce the parties' right to rebut the substance of the communication at the first hearing following the communication where action is considered on the subject to which the communication is related. Commissioners Gustafson and Ewert revealed

ex parte contacts during the Planning Commission's deliberations on this matter without following the requirement ORS 227.180(3)(b). See Exhibit 1, Partial Transcript of November 13, 1995 Canby Planning Commission Hearing (Commissioner Gustafson: "Mr. Chairman, this whole thing brings up a lot of interesting issues that I think we as a Commission are going to need to deal with as far as criteria, procedure and so on and so forth. I'd have to say that one of the reasons that this is here before us tonight is because of our past decisions. It was brought to my attention by the citizenry of Canby, more than one, numerous people, I would say would have to have been within hours of the time whey that sign went out, that we let another ugly yellow sign go up on 99."; Commissioner Ewert: "Ah, I have made three trips up and down 99E in the last couple of months. That is a trip each way, another trip each way and another trip each way. You might say that's six passes on 99E from, as it goes through Canby. One of those trips I had a chauffeur. I mean on one of those sets of trips I had a chauffeur so I could focus entirely on the sign.")

The Planning Commission relied on the ex parte contacts in making its decision. Finding No. 2 provides as follows:

> **"Negative reaction to the color of the sign has been received by the Planning Commission from citizens."**

CZO 16.49.040(1) and (3) do not provide for the Planning Commission to make its decision based upon unspecified comments from citizens, let alone ex parte contacts.

C. **The Planning Commission Did Not Correctly Interpret the Requirements of CZO 16.49.040(1)(A) and (C).**

Finding No. 1 of the Planning Commission decision states:

> **"Compatible, in the context of this application, means 'matching,' 'fitting them with what the City desires'."**

The Planning Commission's findings fail to explain which criterion this finding relates to. If it relates to CZO 16.49.040(1)(A), consideration of sign color is irrelevant. CZO 16.49.040(1)(A) provides as follows:

> **"The proposed site development, including the site plan, architecture, landscaping and graphic design, is in conformance to the standards of this and other applicable City ordinances insofar as the location, height and appearance of the proposed development or involved";**

No provision of 16.49.040(1)(A) applies to signs or colors of signs and the Planning Commission decision fails to explain why this criterion is relevant to this application.

If Finding No. 1 responds to CZO 16.49.040(1)(C), the finding fails to explain whether it is the "proposed development" or the "design character of other structures in the same vicinity" to which the finding is applicable.

Further, the Planning Commission finding is conclusionary because it does not explain why or how the Planning Commission reached this decision.

Moreover, "matching" and "fitting" do not exclude signs that are a different color from the building color. The Planning Commission decision fails to explain why a yellow sign does not match or fit in with a blue sign. As Commissioner Gustafson stated during the Planning Commission deliberation:

"I would make the point that for colors to be compatible doesn't mean they have to be exactly the same. A Santa Claus suit is red and white. The world has a blue sky, *** roses are red and their leaves are green - nobody complains about that stuff. And, so I think that they be compatible does not mean that they have to be exactly the same."

The Planning Commission decision means that CZO 16.49.040(1) is read to require signs to be the same color as buildings. Not only is the decision contrary to the findings and objectives and purposes and objectives of Chapter 16.49, as explained below, the decision establishes a policy that the Planning Commission is a better judge of sign colors than the businesses who pay for them and rely upon them to attract customers. The evidence in the record reveals that virtually none of the signs in the same vicinity of this development's along State Highway 99E match the color of the buildings.

Finally, CZO 16.49.030(2)(A) exempts from site and design review "signs that are not part of a reviewable development project." Unless the sign is otherwise part of a project subject to the site and design review approval, the City does not review color of the sign. See 3(A), above. The Planning Commission's decision means that only those businesses that have a new sign in connection with an otherwise reviewable project will have the color of their signs reviewed, while the vast majority of businesses who periodically change their signs will not be subject to such review. This policy establishes a procedure that is inequitable to the businesses in Canby and unfair to those businesses to which it is applied.

D. **The Planning Commission Did Not Correctly Interpret CZO 16.49 by Finding that a Yellow Sign Is Not Compatible with Blue and Gray Buildings.**

Finding No. 3 is:

> **"The colors of the sign and the buildings are not compatible in that the sign is predominantly yellow, and the buildings are predominantly blue and gray. The Planning Commission finds that these colors are contrasting colors, not compatible colors."**

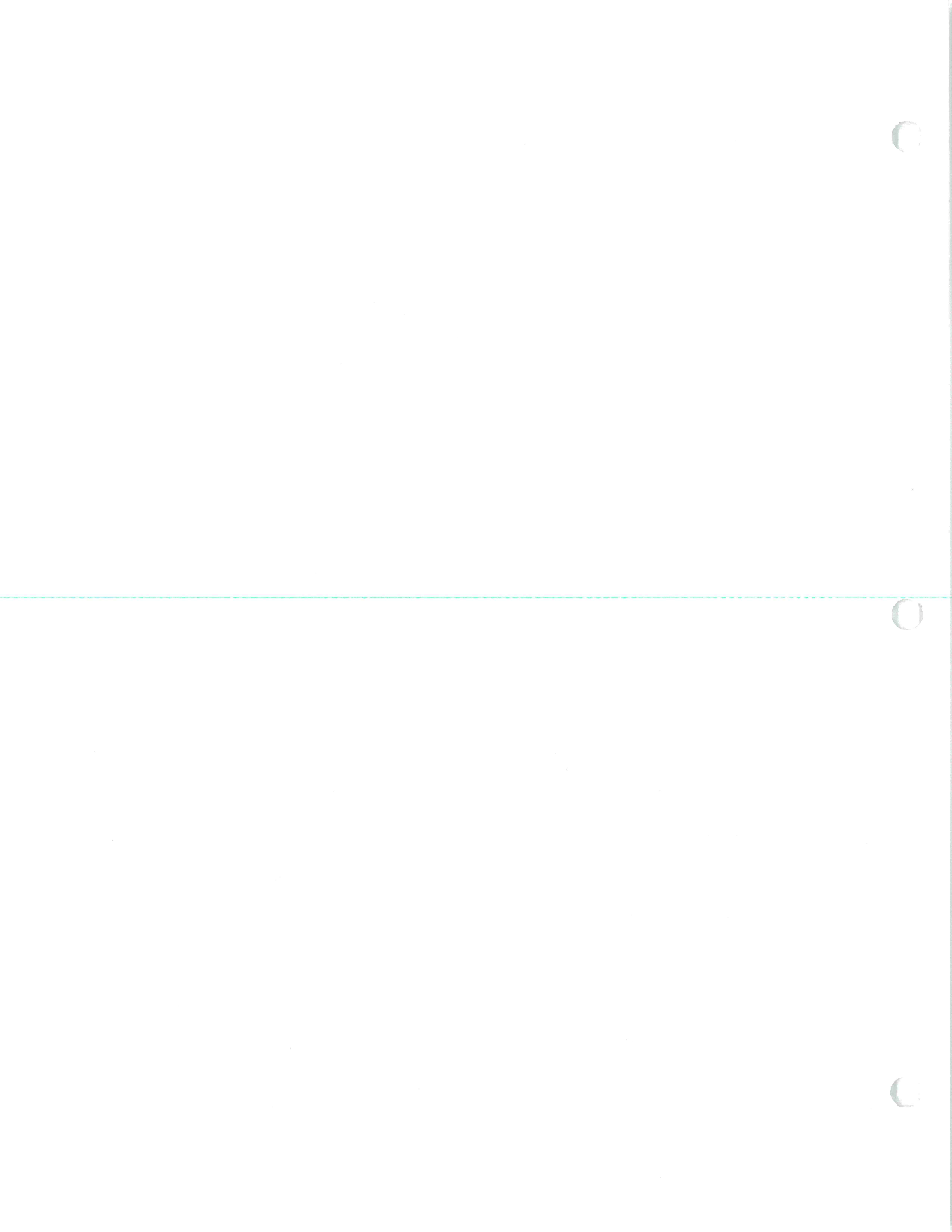
This finding is not consistent with Finding No. 1 which establishes the Planning Commission's definition of compatible. Nothing about "matching" or "fitting in" means that a sign with contrasting colors is not compatible.

E. **The Planning Commission Failed to Correctly Interpret CZO 16.49.040(1)(C) and Failed to Consider all of the Evidence in the Record in Determining that the Exterior of the Structures and Signs Are Not Compatible with the Development.**

This application does not concern the structures, only the sign. Finding No. 4 is flawed because it discusses the exterior of the structure which was not before the Planning Commission.

The Planning Commission's decision is also flawed because it fails to explain why the color of the sign is not compatible with the development. The evidence in the record before the Planning Commission was that the sign color has been used by the applicant elsewhere and that it is the most effective color for attracting customers to the business.

The Planning Commission also failed to explain why it rejected the applicant's proposed definition of compatibility which means "capable of existing." The applicant's proposed definition of compatibility is more consistent with the



purposes of CZO 16.48 than the Planning Commission's interpretation and is more equitable to the businesses in the City of Canby.

F. **The Planning Commission Failed to Correctly Interpret the Requirements of CZO 16.49 by Failing to Consider All of the Factors in CZO 16.49.010(A)(B)(1)(9).**

Finding No. 5 relies on just a few of the many purposes and objectives of CZO 16.49. In fact, the Planning Commission finding is contrary to even the few listed purposes and objectives.

(1) CZO 16.49.010(B)(1) provides that the purpose and objective of site development is to:

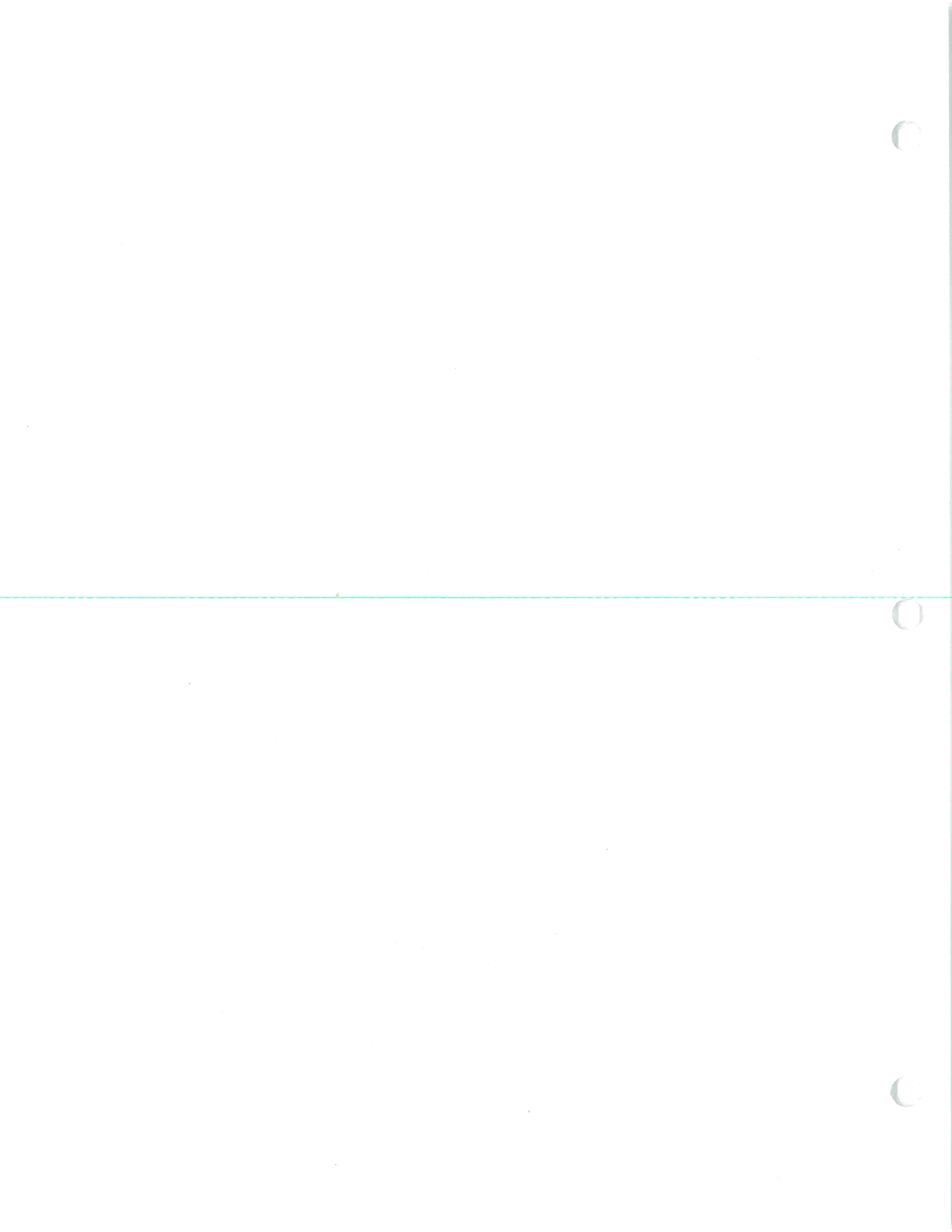
> **"Encourage originality, flexibility in innovation and site planning and development, including the architecture, landscaping and graphic design in said development."**

The Planning Commission's decision does not contain any explanation of why a yellow sign is contrary to this purpose and objective. The Planning Commission's decision discourages originality, flexibility and innovation in development because its policy requires a bland, "one size fits all" approach to colors. Moreover, whether CZO 16.49 is an aesthetic ordinance has no relevance to the approval criteria.

(2) CZO 16.49.010(2) provides:

> **"Discourage monotonous, unsightly, dreary and inharmonious development."**

The Planning Commission's decision encourages monotonous and dreary development because it requires signs to be the same color as buildings.



(3) CZO 16.49.010(B)(3) provides:

> **"Promote the City's natural beauty and visual character and charm by ensuring structures, signs and other improvements are properly related to their sites, and to surrounding sites and structures, with due regard to the aesthetic qualities of the natural terrain and landscaping, and that proper attention is given to exterior appearances of structures, signs and other improvements."**

The Planning Commission decision discourages the promotion of the City's visual character and charm by encouraging a bland, monotonous approach to design.

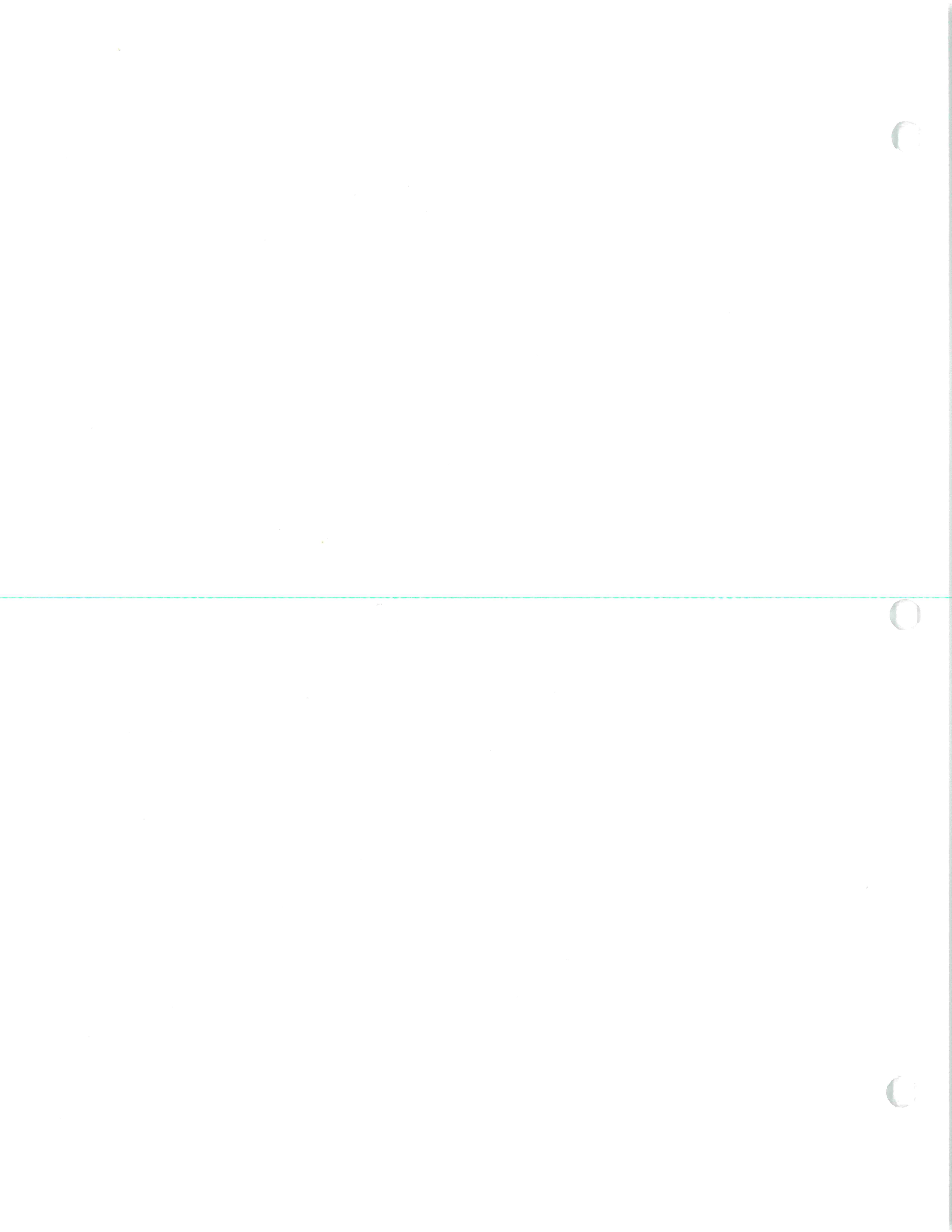
(4) Finally, CZO 16.49.010(B)(4) provides:

> **"Protect or enhance the City's appeal to tourists and visitors and thus support and stimulate business and industry and promote the desirability of investment and occupancy in business, commercial and industrial properties."**

Mr. Howard testified that the yellow sign is more visible to cars and therefore is a better way to attract customers to the mini-storage project. A blue sign is not as visible and has the opposite effect. The Planning Commission's decision in this case fails to promote the desirability of investment in a commercial property.

G. The Planning Commission's Decision Violates Oregon Constitution Article I, Section 8.

The Oregon Constitution protects the right to free expression and is applied to sign content. Where a color is closely associated with the content, local governments may not regulate the color of a sign. In this case, Mr.



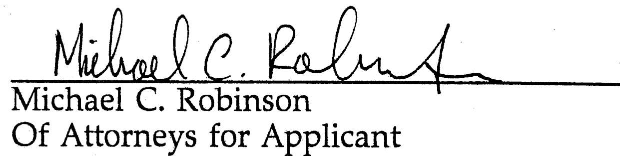
Howard testified that all of his projects have yellow signs. Because this is part of the sign message for Mr. Howard's project, it is equivalent to expression and may not be regulated by the City.

4. Based on the above reasons, Mr. Howard requests that the City Council reverse the Planning Commission decision and approve DR 94-11A.

DATED: December 11, 1995.

Respectfully submitted,

STOEL RIVES



Michael C. Robinson
Of Attorneys for Applicant

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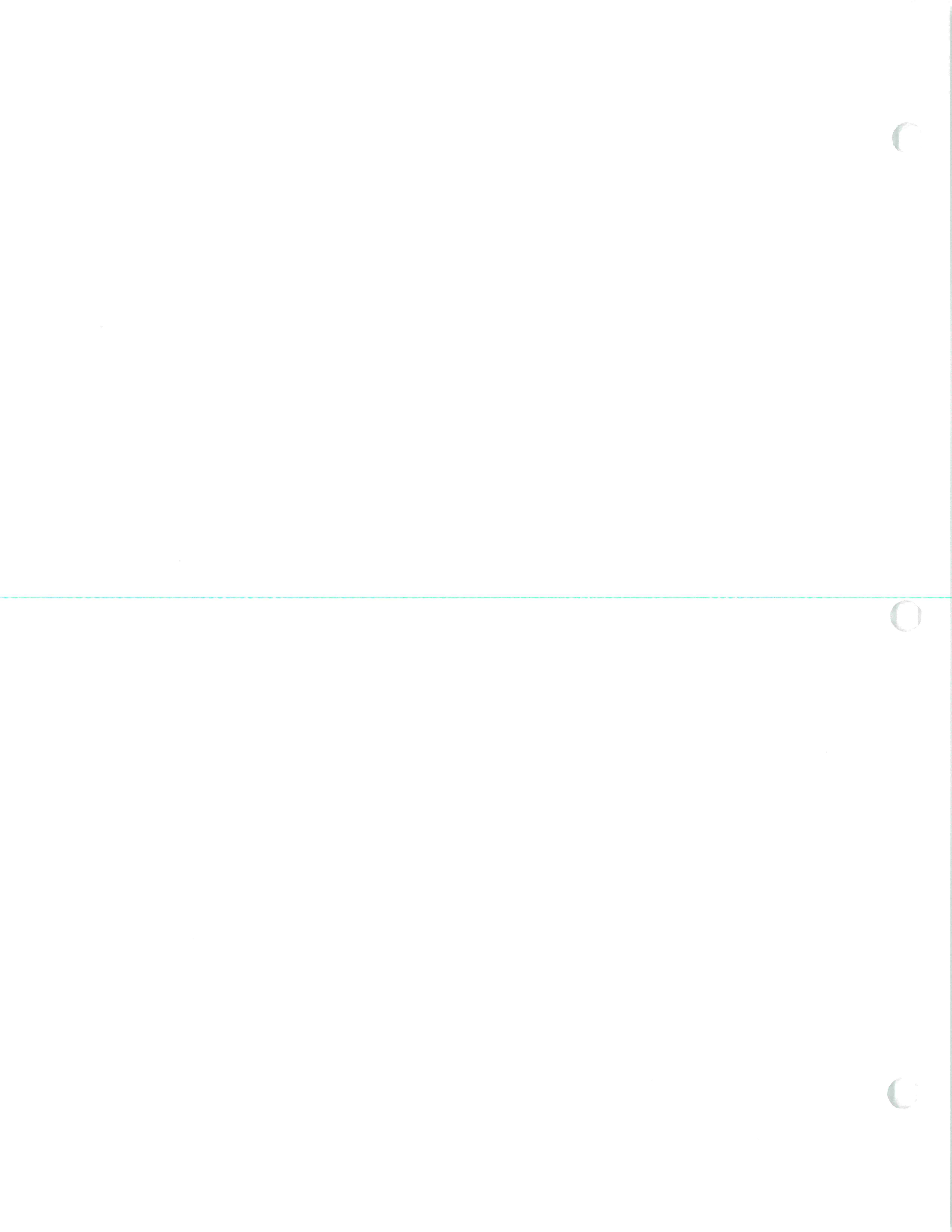


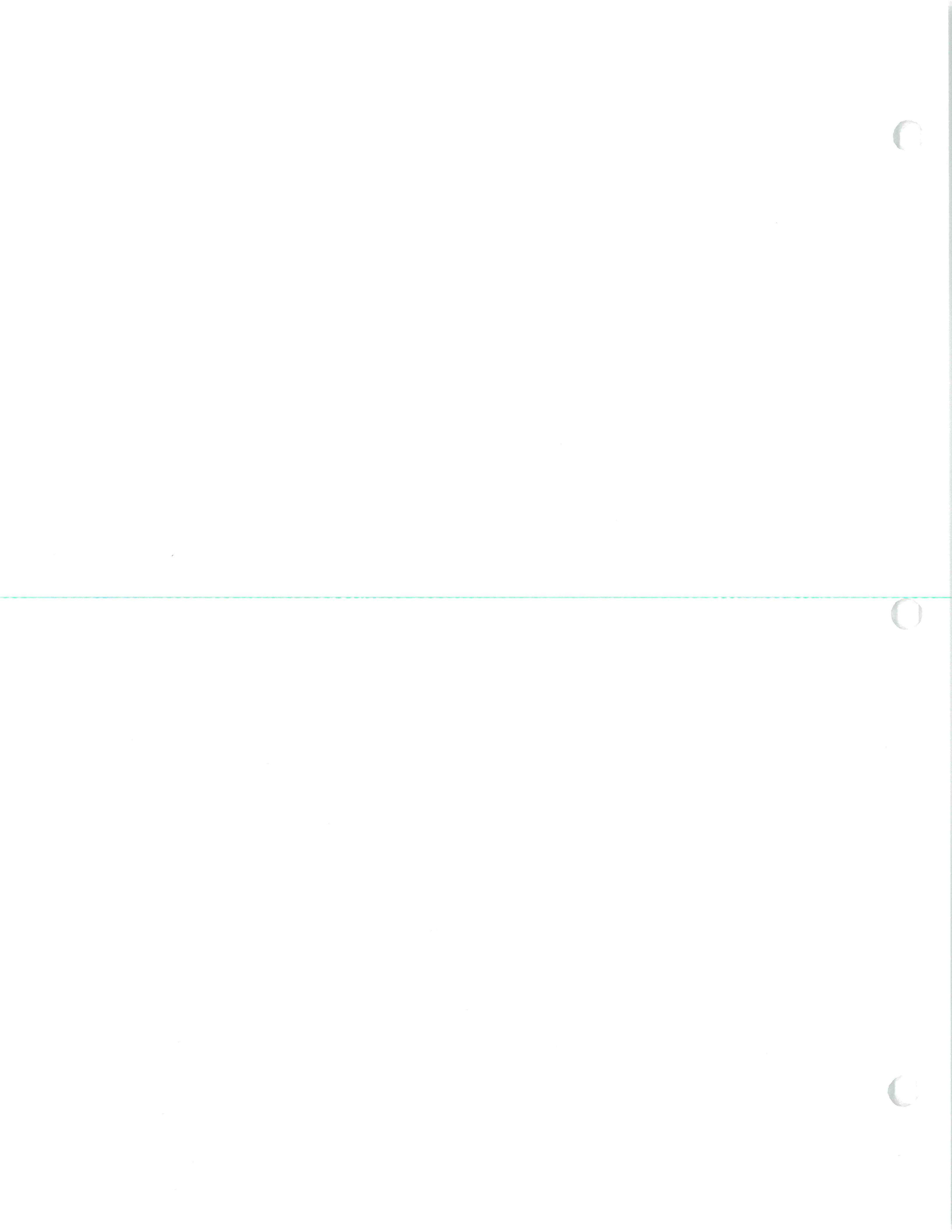
MOTT: At this point I am satisfied [inaudible] to make a decision.

CHAIR: Other comments?

SPEAKER: Mr. Chairman.

CHAIR: Mr. __________.

SPEAKER: Ah, I have made three trips up and down 99E in the last couple of months. That is a trip each way, another trip each way, and another trip each way. You might say that's six passes on 99E from, as it goes through Canby. One of those trips I had a chauffeur. I mean one of those sets of trips I had a chauffeur so I could focus entirely on the signs. The other four trips I was driving like most motorists would. And the diversity of those signs is really surprising--much more so than I ever suspected it would be. There is every shape, size, color, location, message that the human mind could conceive in that relatively short distance. It's amazing. And I think from a practical standpoint, almost anything has been acceptable. And I suppose maybe the things that have not been would have been something that was clearly dangerous or hazardous or something that was so bizarre or obscene or something that would clearly violate decent standards. But that hasn't happened. And I think this sign that's being proposed is clearly in the



spirit of what's there. And I, therefore, am in favor of it.

CHAIR: Other comments?

SPEAKER: Mr. Chairman, this whole thing brings up a lot of interesting issues that I think we as a Commission are going to need to deal with as far as criteria, procedure and so on and so forth. I'd have to say that one of the reasons that this is here before us tonight is because of our past decisions. It was brought to my attention by the citizenry of Canby, more than one, numerous people, I would say would have to have been within hours of the time when that sign went up, that we let another ugly yellow sign go up on 99. And granted I guess that we can't necessarily say whether we do or do not like a color, and I don't think that the decision that we made was based on whether we do or do not like color. And I am getting just a little bit weary of the fact that we are getting an awful lot of flack on making our decisions on whether we do or do not like things; and I'd just like to make this point of record, that we do not make decisions on whether we do or do not like things--whether it be a sign, a gas station or any other item that people may think that we make those decisions on. We make them based on the criteria. And I'd also want to make the

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