



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: October 22, 2025

Department: Public Works

Title: Consider accepting appeal of Hearings Officer decision approving Partition/Variance (P/V) 25-013/Francisco Villalobos

Management Update/Work Session Date: N/A Audio/Visual aids ☐

Time Required: 5 min Contact: Austin Barnes Phone: 503-566-4174

Requested Action: Staff recommended motion: Deny the appeal of Hearings Officer's decision approving Partition/Variance 25-013/Francisco Villalobos.
Other motion options for consideration are:
1. Accept the appeal.
2. Remand the matter back to the hearings officer.

Issue, Description & Background: Partition/Variance 25-013 was for a partition an 8-acre parcel into three parcels consisting of 4-acres, 2-acres, and 2-acres, and for a variance to allow six dwellings to be accessed off a private easement in an Acreage Residential zone located at 2628 Happy Valley Way SE. The Planning Director approved the application which was subsequently appealed. On August 7, 2025, the Hearings Officer held a hearing with an open record period and issued a decision on September 9, 2025, approving the request. Applicants appealed the Hearings Officer's decision on September 24, 2025. Staff recommends the Board deny the appeal, appellants have submitted no new evidence or information and are not asking the board to make a policy decision or interpretation of code.

Financial Impacts: None

Impacts to Department & External Agencies: None

List of attachments: Appeal, Hearings Officer Decision

Presenter: Austin Barnes

Department Head Signature: for Braden Risch

RECEIVED

September 24, 2025

25 SEP 24 P2:56

VIA HAND DELIVERY

Marion County Board of Commissioners
c/o Marion County Clerk
555 Court St NE, 2nd Floor
Salem OR 97301

FILED
MARION COUNTY CLERK

Re: Appeal of Hearings Officer's Land Use Decision (PV 25-013)

Dear Members of the Board of Commissioners:

The undersigned is the appellant and is asking the Board of Commissioners to accept this appeal and to reverse the September 9, 2025, ORDER of the Hearings Officer in case number P/V 25-013 (attached). The applicant in that case had purchased four acres of vacant land from the adjacent land owner to his west with the knowledge that MCC 17.110.800 prohibited him from placing dwellings on the acres so purchased. That prohibition limits to four the maximum number of dwellings that may be served by a private drive (easement), and the applicable easement already serves four dwellings. The applicant desires a variance of 17.110.800 seeking to allow for two additional dwellings to be served by the easement. The applicant's four acres are adjacent to and east of Appellant's property, and the easement is on the north end of Appellant's property. The Planning Director allowed the variance, which has been approved by the hearings officer.

Appellant challenges the hearings officer's ruling, arguing that:

1. The director does not have the power to consider a variance of MCC 17.110.800. (Appellant believes that this may be a matter of first impression for the Board.)
2. If the director does have such power, the applicant has not satisfied all of the required criteria for granting a variance under MCC 17.122.020.

POWER TO GRANT VARIANCES

"17.122.010 Power to grant variances. Subject to the restrictions and provisions contained in this title, the director, planning commission, hearings officer or board shall have the power to vary or modify the strict application of any of the standards of this title in any case where such strict application would result in practical difficulties or unnecessary hardships with reference to requirements governing: lot area, lot width, percentage of lot coverage and number of dwelling units or structures permitted on a lot, height of structures, location, yards, signs, parking and loading space, vision clearance and other standards when limits for an adjustment in MCC 17.116.030 are exceeded. Variances to allow uses or new uses not otherwise allowed are prohibited. Variances to criteria and definitions are also prohibited."

At the August 7, 2025, hearing before the hearings officer, Department staff opined that the power to vary the rule limiting the number of dwellings per easement to four stems from the language “number of dwelling units” contained in 17.122.010. And in his 8/12/25 Response Mr. Bickell on behalf of the applicant emphasized the words “number of dwelling units” in attempting to support the director’s power to vary the limit with regard to the number of dwellings per easement.

Neither 17.110.800 nor its subject matter, limiting the maximum number of dwellings that may be served by an easement to four, is listed in 17.122.010 as a standard that may be varied, which is not disputed by the applicant or the department. But despite that fact, the hearings officer concluded: “It is the determination of the hearings officer that the policy and practice of the County is reasonable and supported by the provisions of MCC 17.122.010 to allow a variance for more than four dwellings to be served by a private road.”

In support of her determination, the hearings officer stated that there are a number of prior cases wherein a variance regarding the number of dwellings per easement limit was allowed. Appellant responds however, that those matters dealt only with whether the criteria for variance had been met, and it does not appear to the appellant that the question of whether the power to do so was ever raised or addressed.

When acknowledging the fact that neither 17.110.800 nor its subject matter is listed in 17.122.010, the hearings officer stated that although the inclusion of many standards may mean that all others are excluded (*expressio unius est exclusion alterius*), such a presumption may need to yield to context. She wrote that if the inclusion of terms is illustrative or there is “catch all” language like “and other” and “otherwise”, then the argument that the list is intended to be exhaustive may be defeated. Appellant agrees with that analysis but argues in response that if that maxim means anything in this case it results in the very clear conclusion that the list is indeed exhaustive because there is nothing in 17.122.010 to suggest that it is merely illustrative, nor is there language that is “catch all” such as “and other” or “otherwise”.

The hearings officer then pointed to the phrase “any of the standards of this title” in 17.122.010 as even broader than a “catch all” phrase. Appellant argues that in doing so the hearings officer totally ignored the limiting and defining following language [bold emphasis added]: **“with reference to requirements governing: lot area, lot width, percentage of lot coverage and number of dwelling units or structures permitted on a lot, height of structures, location, yards, signs, parking and loading space, vision clearance and other standards when limits for an adjustment in MCC 17.116.030 are exceeded.”**

On page 9 of the ORDER, in the first paragraph of item #12, the hearings officer set out a portion of 17.122.010 with the following: "percentage of lot coverage, and number of dwelling units or structures permitted on a lot". In doing so she mistakenly inserted a comma after the word "coverage". A comma in that position might suggest to some that "percentage of lot coverage" is separate and distinct from "and number of dwelling units or structures permitted on at lot". **However the rule contains no such comma**, and indeed, matters relating percentage of lot coverage **and** number of dwellings units or structures permitted are often interrelated and complex. Thus, any attempt to justify a variance of the four dwellings per easement limitation with the isolated and out of context "number of dwelling units" language is misplaced.

(Note also that in the same paragraph purporting to set out the language of 17.122.010 the following language was omitted by the hearings officer: "height of structures, location, yards, signs, parking and loading space, vision clearance and other". These are among the entire list of limiting and defining factors with regard to standards that may be varied.)

When he purchased the vacant land the applicant was not allowed to use it for dwellings because of the four dwellings per easement limitation. Thus if he had requested a variance to increase the number of dwellings from zero to one on each lot, his request would logically be denied because of the four dwellings per easement rule.

Furthermore, if successful, and whether seeking a variance of 17.110.800 as in this case, or whether the applicant had requested an increase of number of dwellings, the "use" of that vacant land would be changed from zero dwellings per lot to one dwelling per lot. However, 17.122.010 also includes the language: "Variances to allow uses or new uses not otherwise allowed are prohibited." The "use" of the four acres at the time of the applicant's purchase did not include dwellings. Accordingly, the correct result in either case is: denial.

Department staff also testified at the hearing that the "other standards" language in 17.122.010 supports the position that the director has the power to vary the four dwellings per easement rule. Appellant responds that the "other standards" language in 17.122.010 is clearly limited to "when limits for an adjustment in MCC 17.116.030 are exceeded". The adjustments that are allowed under MCC 17.116.030 do not include increasing the number of dwellings per easement rule beyond four.

In his application the applicant said that it has been proposed to the Department of Public Works that the limit of four dwellings per easement be increased. Obviously no such proposal has been implemented – nor has the “Power to grant variances” rule been amended to allow for variance of the number of dwellings per easement. Stuck with the existing rules, the department has dictated, albeit out of whole cloth, that 17.122.010 includes the power to vary 17.110.800. This is the equivalent of a legislative act by the director which is prohibited.

If the power to vary this piece of legislation exists, then it would appear that the director has the power to vary any standard, and there would be no reason for the legislatively listed limiting and defining factors in 17.122.010.

The board is urged to conclude and hold specifically that based upon a plain reading of 17.122.010, the standard of not more than four dwellings per easement is not subject to variance.

CRITERIA FOR GRANTING A VARIANCE UNDER MCC 17.122.020

When testifying at the hearing, department staff stated that the department is concerned with safety when considering the variance criteria spelled out in 17.122.020. He further stated that the existing intersection (Burton Place easement, Imig driveway, Drzal driveway, Happy Valley driveway) amounts to a private drive off of another private drive, **which the county no longer permits**. Yet by allowing two more dwellings, there will be two more private drives that are off of a private drive that is off of another private drive!

The criteria require that the problems presented by the applicant are “unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of this title”. First, just as the appellant knew of the limitations dealing with the number of dwellings per easement when purchasing his property in 1987, the applicant knew of such limitations when he purchased his property and when he purchased the additional 4 acres. Appellant argues that knowingly creating and/or accepting conditions and then crying “hardships”, “unreasonable”, and “unnecessary” in regard to those conditions - and then seeking a bailout from the county, is not the scenario that the legislatively created criteria intend.

Finally, a variance to 17.110.800 is not the **only** way to resolve the self-imposed problem presented by the applicant. Back in 2001 the property owners at the other (west) end of Burton Place SE and the county got together, upon the application of the owners, and resolved a virtually identical problem (See Notice of Decision Subdivision 01-5; and site plan submitted in this case by the applicant). That event is not disputed by the applicant.

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There is no evidence that the applicant has made similar attempts to resolve his concerns. Appellant does not know whether the applicant has approached other property owners, but he has not approached the appellant about it. The applicant and the department acknowledge the possibility of taking such a similar approach as an alternative to a variance, but without presenting any evidence of exploring it, they simply offer conclusions with phrases like, "[this variance] is the best alternative for all of the individual property owners", and that it is "more feasible to bolster the easement".

Although the criteria do not explicitly allow for "feasibility" to be considered in the context of "only", perhaps it must be implicitly considered if it is shown that, in fact, the alternative is virtually impossible and therefore out of the question. However, a similar problem was successfully resolved by the property owners and county in 2001, and the applicant has made no attempt whatsoever to work with other property owners and the county to resolve his problem in a similar fashion. In conclusion, the applicant has not satisfied the **only** requirement.

Respectfully submitted,



Victor C Pagel
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P.S. Although the director's Decision and the hearings officer's Order at times reference "five dwellings" per easement, the applicant has requested six and Order allows six.

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of) Case No. P / V 25-013
)
FRANCISCO VILLALOBOS) **PARTITION / VARIANCE**

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the Application of Francisco Villalobos to partition an 8-acre parcel into three parcels consisting of 4-acres, 2-acres, and 2-acres and a variance to MCC 17.110.800 to allow five dwellings to be served off a private easement in an AR (Acreage Residential) zone located at 2628 Happy Valley Way SE, Salem.

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Rural Code, Marion County Code (MCC) Chapter 17, particularly Chapter 17.128 (Acreage Residential Zone), Chapter 17.122 (Variances), and Chapter 17.110.800 (Dwellings and all other buildings to be accessible to a public street).

III. Public Hearing

A public hearing was held on this matter on August 7, 2025. At the hearing, the Planning Division file was made a part of the record. The following persons appeared at the hearing and provided testimony and/or argument on the Application:

- | | | |
|----|----------------|---------------------------------|
| 1. | Austin Barnes | Marion County Planning Division |
| 2. | Norman Bickell | Applicant Representative |
| 3. | Victor Pagel | Appellant / Opponent |

No objections were made to notice, jurisdiction, or conflict of interest. The following exhibits were presented at the hearing, and included in the record:

- Exhibit 1: Map 08 2W 02C
Exhibit 2: Written Statement of Victor Pagel

An open record period was requested by Applicant and Appellant pursuant to ORS 197.797 and MCC 16.44.100. Applicant provided his first open-record submission to Planning on August 12, 2025. However, because of an email address error, Mr. Pagel did not receive the submission until Monday, April 18, 2025. Mr. Pagel therefore requested until Monday, August 25, 2025 to provide a second open-record submission, and the Applicant was granted until September 2, 2025 for a final submission to allow for the Labor Day holiday on September 1, 2025.

The following submissions were entered into the record:

- | | |
|-----------------------|--|
| Open Record Period 1: | Response to Appellant Letter Opposing the Granting of a Variance/Partitioning on Applicant's Property from Norman Bickell for Francesco Villalobos |
| Open Record Period 2: | Submission of Victor Pagel |
| Open Record Period 3: | Final Submission from Norman Bickell on behalf of Applicant |

IV. Executive Summary

Applicant seeks to partition an 8-acre parcel into three parcels consisting of 4-acres, 2-acres, and 2-acres and a variance to allow five dwellings to be served off a private easement in an AR (Acreage Residential) zone. Marion County Planning Division approved the application, and the decision was appealed by an adjacent property owner.

The Notice of Appeal challenges whether MCC 17.122.010 authorizes a variance of the number of dwellings to be served by an easement. If such authority exists, Appellant also challenges whether Applicant meets the variance criteria.

Marion County Planning has interpreted MCC 17.122.010 to allow a variance, and variances to the number of dwellings allowed off a private drive were granted in V 22-004 (after a public hearing), V 06-007, and V 06-002. MCC 17.122.010 includes language that provides authority for the hearings officer (or director, planning commission or Board) to allow a variance for a "any of the standards of this title" (not uses). A "standard of this title" is the access standard. The four-dwelling limit on a private drive is a standard stated at MCC 17.110.800. As a standard, the four-dwelling limit can be varied if the variance criteria are satisfied.

Further, the AR zone has a limitation on the amount of land available for development, and the allowance of a variance to reach density allowed in the zone will accomplish efficient use of the land in the AR zone and is critical to reduce the pressure for expanding the zone into adjacent resource zones.

Upon presentation of the evidence and review of the record, the Hearings Officer determines that the proposed partitioning and variance complies with the criteria in the AR zone and Applicant has met his burden of proving the applicable standards and criteria for **APPROVAL** subject to conditions.

V. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

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Francisco Villalobos

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1. The property is designated Rural Residential in the Marion County Comprehensive Plan. The purpose of this designation and the corresponding AR (Acreage Residential) zone is to allow creation of acreage homesites at a density that maintains the character and environmental quality of rural residential areas.
2. The subject property is located at the end of Happy Valley Way SE, approximately 450 feet south of its intersection with Burton Pl SE. The property contains one dwelling and a few accessory structures in the northeast corner. South of the dwelling contains a dense wooded area. A canal/ditch runs along the southwest property line.

The subject property was first created as Parcel 1 of Partition Case P94-051. The property was then subject of P/PLA23-021, in which tax lot 100 gained acreage from the southern portion of what was once tax lot 200, making tax lot 100 8-acres in size. The subject property is therefore legal for land use purposes.

3. Surrounding uses consist of AR parcels containing acreage homesites.
4. Applicant proposes to divide an 8-acre parcel into three parcels consisting of 4-acres, 2-acres, and 2-acres. The applicant also requests a variance to allow more than four dwellings to be served by a private road, as the roads Burton Pl and Happy Valley Wy already create access to four dwellings.
5. The Marion County Planning Division requested comments from various governmental agencies:

Public Works Land Development and Engineering Permits (LDEP) commented:

Applicant is advised to consult with the local Fire Marshal regarding any plat requirements for depiction of fire easement turnouts and/or turnaround and potential construction of emergency access improvements as triggered by application for building permits.

Marion County Surveyor's Office commented:

- a. Parcels must be surveyed and monumented.
- b. Per ORS 92.050, plat must be submitted for review.
- c. Checking fee and recording fees required.
- d. A current or updated title report must be submitted at the time of review. Title reports shall be no more than 15 days old at the time of approval of the plat by the Surveyor's Office, which may require additional updated reports.

Marion County Fire District No. 1 commented that the project must meet following code requirements:

- a. Fire-flow requirements for buildings in protected areas without adequate and reliable water systems. The 2017 National Fire Protection Association 1142,

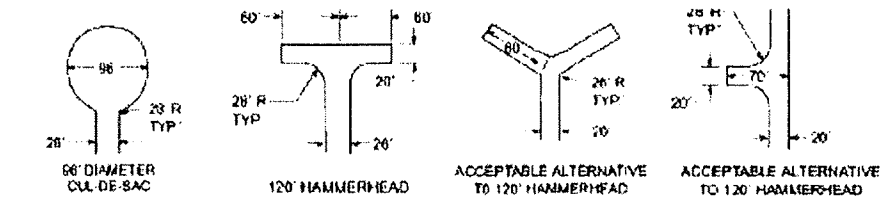
PARTITION / VARIANCE 25-013

Francisco Villalobos

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Standard on water supplies for suburban and rural firefighting. 2022 Oregon Fire Code Section B 107. The requirements for firefighting water supplies may be modified as approved by the fire code official where any of the following apply: (2022 OFC 503.1.1 Exception).

- i. Buildings are equipped throughout with an approved automatic fire sprinkler system (the approval of this alternate method of construction shall be accomplished in accordance with the provisions of ORS 455.610(5).
 - ii. There are not more than two Group R-3 or Group U occupancies.
- b. Fire Safety During Construction: Approved fire department access road, required water supply, fire hydrants, and safety precautions shall be installed and serviceable prior to and during the time of construction. 2022 Oregon Fire Code Chapter 33.
 - c. Turnouts: When a fire apparatus access road exceeds 400' feet in length, turnouts 10' feet wide and 30' feet long shall be provided in addition to the required road width and shall be placed no more than 400' feet apart, unless otherwise approved by the fire code official. These distances may be adjusted based on visibility and sight distances. (OFC Chapter 5)
 - d. Turning radius: The inside turning radius and outside turning radius shall be not less than 28 feet and 48 feet respectively, measured from the same center point. (2022 OFC 503.2.4 & Appendix D)
 - e. Fire apparatus road distance from buildings and turnarounds: Access roads shall be within 150' of all portions of the exterior wall of the building as measured by and approve route around the exterior of the building. An approved turnaround is required if the remaining distance to an approve intersection roadway, as measured along the fire apparatus access road, is greater than 150'. 2022 Oregon Fire Code 503.1.1
 - f. Dead End Roads: Dead end fire apparatus access roads in excess of 150' feet in length shall be provided with an approved turnaround. Diagrams of approved turnarounds are shown below: (OFC 503.2.5)



- g. Fire Apparatus Access Road Width and Vertical Clearance: Fire apparatus access roads shall have an unobstructed driving surface width of not less than 20 feet; 26 feet adjacent to fire hydrants 2014 Oregon Fire Code (OFC) Appendix D 103.1 and an unobstructed vertical clearance of not less than 13 feet 6 inches. 2022 Oregon Fire Code Section 503.2.1 and Appendix D103.1
- h. No parking signs: Where fire apparatus roadways are not of sufficient width to accommodate parked vehicles and 20 feet of unobstructed driving surface, “No Parking” signs shall be installed on one or both sides of the roadway and in turnarounds as needed. Roads 26 feet wide or less shall be posted on both sides as a fire lane. Roads more than 26 feet wide to 32 feet wide shall be posted on one side as a fire lane. Signs shall read “NO PARKING – FIRE LANE” and shall be installed with a clear space above grade level of 7 feet. Signs shall be 12 inches wide by 18 inches high and shall have red letters on a reflective white background. 2022 OFC D103.6-D103.6.2. You may contact the Fire Marshal if you would like code requirement for painted curbs. 2022 OFC 503.3
- i. Premise identification: Buildings shall have address numbers or approved identification placed in a position that is plainly legible and visible from the access road fronting the property. Numbers shall contrast with their background and shall be a minimum of 4 inches height with a minimum stroke width of ½ inch. 2022 OFC 505.
- j. Gates: Gates securing fire apparatus roads shall comply with all the following (2022 OFC D103.5):
 - i. Minimum unobstructed width shall be 16 feet.
 - ii. Gates shall be set back a minimum of 30 feet from the intersecting roadway.
 - iii. Gates shall be of the swinging type or sliding type.
 - iv. Manual operation shall be capable by one person.
 - v. Electric gates shall be equipped with a means for operation for fire department personnel.
 - vi. Locking devices shall be approved

Marion County Building Inspection commented: “No Building Inspection concerns. Permit(s) are required to be obtained prior to development of structures and/or utilities installation on private property.”

Marion County Septic commented: “A site evaluation is required for both proposed 2-acre parcels and an Existing System Evaluation is required on the proposed 4-acre parcel to verify a 10’ setback to property lines and verify there is room for a repair system on the property.”

Marion County Tax Assessor provided information regarding taxes on the subject property.

All other contacted agencies either failed to comment or stated no objection to the proposal.

6. Austin Barnes, Marion County Planning Department, testified at the hearing. Mr. Barnes stated that this proposal involves a private drive that is located off a private drive, which was previously allowed by the County but is now longer permitted. Mr. Barnes explained that when Planning is considering a variance to a private road, the significant inquire is whether the road is safe and are there any existing hazards. In this case, based on historic use and road engineering, there are no safety concerns from Planning's perspective. Mr. Barnes noted that the Appellant previously applied to partition as the Applicant has done, and such application was approved. Mr. Barnes further explained that the Appellant's concern about the reduction of his property value based upon the partition and variance is not a criterion under the Marion County Code. Mr. Barnes responded to the Appellant's concern that the variance criteria is not satisfied in noting that no criteria is cited by Appellant. Mr. Barnes stated that in this case, there is no other way to provide access to the parcel, and that if development is permitted, the road safely supports additional traffic. Planning determines that the variance criteria are met.
7. Norman Bickell, Applicant Representative, testified at the hearing. Mr. Bickell testified that he agrees with Planning that this area of Macleay has been partitioned prior to land use planning in 1973, and that there has been redivision over the years. Mr. Bickell does not see that the Appellant would be losing value to his property with approval of the application, but that issue does not have any bearing on whether the criteria is met. Mr. Bickell argues that the criteria are satisfied, and that the hearings officer does have authority to grant a variance to the number of dwellings served under MCC 17.122.020. Mr. Bickell states that there could not be an extension to Burton place because the lots are not owned by the Applicant. Mr. Bickell testified that there are no safety issues associated with the roadway because the road is paved, and the 12-foot width is sufficient for a private road.
8. Victor Pagel, Appellant, testified at the hearing. Mr. Pagel submitted his written comments as Exhibit 2. Mr. Pagel stated that he and his wife, Martha Pagel, deceased bought their property in 1987. Mr. Pagel stated that before the hearings officer can review the criteria, the determination must be made regarding whether MCC 17.122.010 gives the hearings officer the power to grant a variance. Mr. Pagel argues that the hearings office does not have the authority to grant a variance under MCC 17.122.010: the type of variance requested (limitation of the number of dwellings per easement standard) is not permitted. Mr. Pagel states that because MCC 17.122.010 includes specific references (lot area, lot width, percentage of lot coverage and number of dwelling units or structures permitted on a lot, height of structure, location, yards, signs, parking and loading space, vision clearance and other standards), because "number of homes to be served by a private roadway" is not included, it is specifically excluded.

Mr. Pagel testified that the only review criteria on which Planning focused is safety. Mr. Pagel argues that the easement is only a single lane of traffic, and he disputes that there are only two lots without sufficient right of way. Mr. Pagel argues there are alternative to

the variance, including extending Burton Place. Mr. Pagel testified that the County no longer permits the private intersections, and it should similarly not increase use with a variance in this case. Mr. Pagel argues that increased traffic results in a decreased value of his property which has the effect of condemnation.

Victor Pagel testified that his objection is focused on the variance, not the partition.

9. On August 12, 2025, Applicant's First Open Record Submittal was received. Applicant's submission addressed the questions presented by Appellant: (1) Whether the hearings officer has the authority to grant a variance; (2) Whether the criteria in MCC 17.122.020 is met; (3) Whether the 10.5 feet paved roadway is sufficient for vehicular traffic; (4) Whether other property owners were approached to extend public right of way; and (5) Whether the easement concerns raised by applicant are sufficient to limit additional use of the easement.

Applicant argues that the power to grant variances arises in MCC 17.122 language allowing a variance with respect to the "number of dwelling units" when "limits for an adjustment" in 17.116.030 are exceeded." Marion County Planning determined, based on policy and interpretation, that the number of dwelling units that are limited off a private easement is a variable standard.

Applicant's continued position is that the criteria of MCC 17.122.020 is satisfied.

Applicant agrees to add two additional feet of gravel to the existing 10.5 feet paved roadway to verify the easement is an all-weather surface with a minimum of 12 feet.

Applicant argues that he has no right to provide for a public street extension of Burton Place SE, and that such provision is cost-prohibited. Also, Applicant has frontage on the easement.

Applicant argues that Appellant's easement concerns are shared with any easement, and that the concerns would be in place regardless of the number of dwelling units served by the easement.

10. On August 25, 2025, the Appellant submitted his supplemental comments in opposition to the variance requested in P V 25-013. Appellant argues that MCC 17.122.010 is silent as to the limitation of the number of dwellings per easement standard, yet specific with regard to listing matters about which standards may be varied. Mr. Pagel argues that a legislative act is required to modify MCC 17.110.800 to allow its variance.

Appellant argues that the feasibility of alternate should be further considered, and that safety of the existing access and risks of damage raises a legitimate question about whether the criteria for a variance have been satisfied.

11. On September 2, 2025, the Applicant submitted his final submission. Applicant argues that the number of additional dwellings to be served by the easement is a variable standard, and that the interpretation is consistent with prior County decisions (included for illustrative purposes). Applicant also argues that there are no alternatives to a variance (as suggested by Appellant) because the alternative unreasonably requests that other property owners (not participating in the hearing) to give up an additional 30 feet of their property to accomplish the 60 feet required for a public street (none of which would be the appellant).

VI. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving all applicable standards and criteria are met by a preponderance of the evidence that all applicable standards and criteria are met as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(1987).

“Preponderance of the evidence” means the greater weight of evidence. It is such evidence that when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted).

2. Applicant must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, applicants have not met their burden, and the application must be denied. If the evidence for every criterion there's a hair or breath in applicant's favor the burden of proof is met and the application is approved.
3. The Planning Director for Marion County approved the application on June 12, 2025, subject to certain conditions.
4. Victor C. Pagel, an interested party, filed an Appeal of the Planning Division Decision on June 27, 2025. Mr. Pagel filed the appeal on the basis that (1) the government's decision results in a reduction in land value for his property; (2) The partitioning of the land to allow additional dwellings is not authorized; and (3) that the variance criteria necessary to allow more than four dwellings to be served by private easement are not satisfied. The appeal is timely, and a public hearing was scheduled in response to the notice of appeal.

PARTITION

5. There are no specific approval criteria for partitioning property in the AR zone. MCC 17.128.070 requires a minimum lot size of two acres.

Applicant proposes to develop three lots: two lots with consisting of 2 acres, and a third lot consisting of 4 acres. Each lot will comply with the minimum lot size of the zone. The standard is met.

PARTITION / VARIANCE 25-013

Francisco Villalobos

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Final partitioning may vary from the proposed plan due to topography or surveying. Minor variations are permitted; however, each resulting parcel shall be a minimum of two acres in size.

6. Appellant, Mr. Pagel, challenges the authorization to partition the four (4) acres to allow for more dwellings. However, no specific basis for the lack of authorization under the Marion County Code is stated. Although Mr. Pagel challenges the authorization, his primary objection is directed at the proposed variance rather than the proposed partition.
7. The proposal meets the criteria for partitioning in the AR zone.

VARIANCE

8. MCC 17.122.040 permits an application for a variance to be filed by the owner of the property that is the subject of the application. Francisco Villalobos submitted a Bargain and Sale Deed recorded in the Marion County Records at 2024-33823 which indicated Francisco Villalobos is the owner of the subject property. The criterion is met.
9. MCC 17.122.045 requires the variance application to include the signature of the owner of the subject property (or agents otherwise identified in MCC 17.122.040). Francisco Villalobos signed the application for the variance. The criterion is met.
10. The proposed partitioning would serve six (6) dwellings served from a private easement, Happy Valley Way SE. Marion County Code 17.110.800 limits the number of dwellings served by a private road to four (4) dwellings. Applicant seeks a variance to allow two additional dwellings to be served by Happy Valley Way SE. The area of the proposed partitioning does not have direct access to a public roadway.
11. The director, planning commission, hearings officer, or board may permit and authorize a variance when it appears from the application and facts presented that the proposal satisfies the variance criteria listed in MCC 17.122.020(A).
12. MCC 17.122.010 (Power to Grant Variances) provides: Subject to the restrictions and provisions contained in this title, the director, planning commission, hearings officer or board shall have the power to vary or modify the strict application of any of the standards of this title in any case where such strict application would result in practical difficulties or unnecessary hardships with reference to requirements governing: lot area, lot width, percentage of lot coverage, and number of dwelling units or structures permitted on a lot, standards when limits for an adjustment in MCC 17.116.030 are exceeded. Variances to allow uses or new uses not otherwise allowed are prohibited. Variance to criteria and definition are also prohibited.

MCC 17.110.800 (Dwellings and All Other Buildings To Be Accessible to Public Street) provides: Every dwelling shall be situated on a lot having direct access by abutting upon a public street or a pre-existing private driveway of a width not less than 20 feet. A private drive shall not serve more than four dwelling units unless the parcels, on which

those units are proposed to be placed, were established with the approval of Marion County in accordance with State Law and Marion County ordinances prior to May 1, 1977, or were approved under Chapter 17.121 MCC Planned Development.

Appellant rejects the interpretation and policy implemented by Marion County Planning that a variance can be sought to allow more than four dwellings to be served by a private road. Appellant argues that MCC 17.122.010 is silent as to the limitation of the number of dwellings per easement standard, yet specific with regard to listing matters about which standards may be varied. Appellant argues that a legislative act is required to modify MCC 17.110.800 to allow its variance.

As evidenced by prior orders submitted by Applicant, MCC 17.122.010 has been interpreted to allow a variance to allow more than four dwellings to be served by a private road. In practice, the County has treated requests to serve more than four dwellings on a private road as a variance and evaluated them under MCC 17.122.020 (hardship, unusual circumstances, minimum necessary, no significant adverse effects, intent maintained).

Appellant Pagel advances an *expressio unius est exclusion alterius* argument (the expression of one thing implies the exclusion of others). Courts have treated this maxim as a presumption that yields to context. If the inclusion of terms is illustrative, then the specific expression is not intended to exclude another term. The inclusion of “catch all” language like “and other” and “otherwise” can also defeat the construction that the list is intended to be exhaustive.

MCC 17.122.010 does include language that provides authority for the hearings officer to allow a variance for a “any of the standards of this title.” The language “any of the standards of this title” is even broader than a “catch all” phrase and references a broader category of permissible variances than the non-exhaustive listing in the code.

Further, the AR zone has a limitation on the amount of land available for development, and the allowance of a variance to reach density allowed in the zone is critical to reduce the pressure for expanding the zone into adjacent resource zones.

Applicant provided an assessor’s map of the surrounding area which shows that the area has been repartitioned into smaller lots during the last 20 years, which Applicant argues is a more efficient use of the land in the AR zone. Applicant suggests that approval of the variance will accomplish the infill of the area in an efficient manner.

It is the determination of the hearings officer that the policy and practice of the County is reasonable and supported by the provisions of MCC 17.122.010 to allow a variance for more than four dwellings to be served by a private road.

MCC 17.122.010 gives the county authority to vary “any of the standards of this title” (not uses). A “standard of this title” is access standard. The four-dwelling limit on a

private drive is a standard stated at MCC 17.110.800. As a standard, the four-dwelling limit can be varied if the variance criteria are satisfied.

13. The variance criteria listed in MCC 17.122.020(A) must be met by the Applicant:

1. *There are unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of this title; and*

The only access to the subject property is off Happy Valley Wy SE. There is no direct access to a public roadway. Applicant states that the granting of this variance will effectively utilize this residential land and will keep development from encroaching on nearby resource zones.

Without the variance to MCC 17.110.800, Applicant would not be able to partition and develop the land to the maximum density allowed by the AR zone. The criterion is met.

2. *There are unusual circumstances or conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the same zone; however, nonconforming land uses or structures in the vicinity or violations of land use regulations or standards on the subject property shall not in themselves constitute such circumstances or conditions; and*

The AR designation for this neighborhood is intended for use with acreage homesites. Marion County approved the partitioning of this land under Partition Plat P 95-059 through land use case P94-051. At the time, due to existing development in the area, there was not an opportunity to expand any public roadway for access to the newly created parcels.

A private roadway, Burton Pl SE, had already been established, eliminating the possibility for a public roadway on Burton Place SE; therefore, Happy Valley Wy SE was created.

This situation presents an unusual circumstance concerning the amount of partitionable land on the subject parcel, which can only be addressed through the granting of a variance. The development goals for the area and the code limiting access to more than four homes are in contradiction, a situation that was established during the original subdivision of the neighborhood. The most reasonable option for development is to permit a variance to MCC 17.110.800. The criterion is met.

3. *The degree of variance from the standard is the minimum necessary to permit development of the property for the proposed use; and*

The proposed use is to allow the creation of three lots, maximizing the rural residential capacity in the AR zone which requires a 2-acre minimum. This degree of variance is the minimum to permit the proposed development. The criterion is met.

4. *The variance will not have a significant adverse effect on property or improvements in the neighborhood of the subject property; and*

The roadway currently serves four lots, each containing a dwelling. This rural area has undergone multiple partitioning efforts over the past 40 years. Therefore, the addition of two homesites off Happy Valley Wy SE appears to align with the development goals of this neighborhood.

Both Burton Pl SE and Happy Valley Wy SE are paved and well-maintained roadways. Additionally, since the uses of the newly created parcels will not be commercial or industrial, the traffic impact on these private roads will be minimal.

The variance will allow the roadways use by two homesites, which should not have a significant or adverse impact. There is no evidence of unreasonable additional noise, traffic, visibility, or other issues that could impact the neighborhood. The criterion is met.

5. *The variance will not have a significant adverse effect upon the health or safety of persons working or residing in the vicinity; and*

Requests for Comments were sent out to various agencies regarding the proposed partition and variance. The Marion County No. 1 Fire District did not indicate any access or safety concerns. Any requirements for fire turnarounds may be placed by the fire district at the time building permits are applied for. Each lot will have to provide evidence of an approved septic system and will have to enter into an access and utility easement agreement for the maintenance of the easement. It appears that the proposed variance to allow six dwellings to be served by Happy Valley Wy SE would not adversely affect public health or safety. The criterion is met.

6. *The variance will maintain the intent and purpose of the provision being varied.*

Appellant argues that the because the County no longer permits a private drive off of another private drive as a safety concern, this variance should not be allowed (with the risk of damage and injuries stated in Appellant's August 7 written comments).

Applicant states that the restriction on the number of dwellings that can be served off a private easement was developed with the original adoption of the zoning ordinance. Applicant states that in this case, the number of dwellings being served will increase from 4 to 6 and with agreements for maintenance of the easements in place, there should not be any significant impact to adjoining properties.

Allowing Burton Pl SE and Happy Valley Wy SE to serve two additional dwellings in its current condition would not exceed its capacity. Public Works LDEP did not make any requirements regarding improvements on these roads, insinuating the roadways can handle the newly proposed development. Although concerns about "increased risk of

damage or injury” is noted, there is not sufficient evidence that the variance would result in safety issues or modify the intent and purpose of the provision. The criterion is met.

Objection on Constitutional Grounds

14. Appellant Victor Pagel argues that the “effect of this governmental decision is to reduce the value of [his] land, without just compensation to him. Mr. Pagel’s argument essentially claims that approval of this land use application results in a “taking” of his property in violation of the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Oregon Constitution. To succeed with this claim, Mr. Pagel government physically occupies the land, or if the decision requires the dedication of land (e.g. for a road) without a clear nexus and proportionality. See, e.g. *Nollan v. California Coastal Comm’n*, 483 US 825 (1987) and *Dolan v. City of Tigard*, 512 US 374 (1994).

Mr. Pagel alleges that the value of his land is reduced solely in order to increase the value of Applicant’s land. Mr. Pagel, has a reasonable concern about the easement, but it is a concern about easements in general. There is no indication that use of the roadway by two additional dwellings will cause a measurable loss to Mr. Pagel’s property value.

There is no sufficient evidence to indicate that a variance to allow more than four dwellings to use a private roadway is a taking of Mr. Pagel’s property without a clear nexus or proportionality.

The hearings officer recognizes that Mr. Pagel has raised a constitutional issue in this forum. However, Applicant meets the applicable criteria for a partition and variance under the Marion County Code, and there is no indication that application of the relevant provisions is unconstitutional.

15. Based on the above findings, the proposed partitioning complies with the above criteria and is therefore, **APPROVED**, subject to conditions stated herein which are necessary for the health and safety.

VII. Order

It is hereby found that Applicant has met his burden of proving the applicable standards and criteria for approval of a variance application. Therefore, the partition and variance application is **APPROVED**, with the following conditions:

1. Conditions required by the Marion County Surveyor’s Office:
 - a. Parcels must be surveyed and monumented.
 - b. Per ORS 92.050, plat must be submitted for review.
 - c. Checking fee and recording fees required.
 - d. A current or updated title report must be submitted at the time of review. Title reports shall be no more than 15 days old at the time of approval of the plat by the Surveyor’s Office, which may require additional updated reports.

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2. The resulting parcels shall significantly conform to the site plan submitted with the proposal. Minor variations are permitted upon review and approval by the Planning Director. All parcels shall be a minimum of two acres in size.
3. The northernmost 2-acre parcel shall be addressed: 2625 Happy Valley Wy SE.
The southernmost 2-acre parcel shall be addressed: 2675 Happy Valley Wy SE.
The parent parcel, the existing 4-acre parcel, shall remain: 2628 Happy Valley Wy SE.
Addresses will be finalized at the time that building permit applications are reviewed and may change if alterations are made to the property or nearby properties.
4. After the final Partition plat has been recorded no alteration of property lines shall be permitted without first obtaining approval from the Planning Director.

VIII. Other Permits

It is advised that the use of the property proposed in this Application may require additional permits from other local, state or federal agencies the Marion County land use review and approval process does not take the place of or relieve the Applicant of responsibility for acquiring such other permits or satisfy any restrictions or conditions thereon the land use permit approved here and does not remove alter or impair in any way covenants or restrictions imposed on this property by deed or other instrument.

It is recommended that the agencies mentioned in Finding of Fact No. 5 herein be contacted to identify restrictions or necessary permits. Applicant is advised of the following:

- a. Prior to recording the plat, all taxes due must be paid to the Marion County Tax Department (contact the Marion County Tax Department at 503-588-5215 for verification of payments).
- b. The applicant should contact the Marion County No. 1 Fire District to obtain a copy of the District's Recommended Building Access and Premise Identification regulations and the Marion County Fire Code Applications Guide. Fire District access standards may be more restrictive than County standards.
- c. Applicant is advised to check with Marion County Building Inspection for any building or septic requirements.

IX. Effective Date

The application approved herein shall become effective on the 25th day of September, 2025, unless the Marion County Board of Commissioners, on its own motion or by appeal timely filed, is asked to review this order in case of board review, this order shall be stayed and shall be subject to final action as is taken by the board.

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X. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Suite 2130, Salem, OR 97301) by 5:00 p.m. on the 24th day of September, 2025. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED this 9th day of September, 2025.



Jill F. Foster
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Francisco Villalobos
2628 Happy Valley Way SE
Salem, OR 97317

Tax Collector (via email)
NMcVey@co.marion.or.us
ADhillon@co.marion.or.us

Norman Bickell
3322 42nd Avenue SE #771
Salem, OR 97317

Surveyor's Office (via email)
Klnman@co.marion.or.us

Victor Pagel
7826 Burton Place SE
Salem, OR 97301

Fire District: (via email)
salemfire@cityofsalem.net

Kathy Cervantes
2532 Rose Garden St NE
Salem, OR 97301

Planning Division (via email)
breich@co.marion.or.us
abarnes@co.marion.or.us
jspeckman@co.marion.or.us
ediaz@co.marion.or.us

Area Advisory Committee #3:
None

Building Inspection (via email)
pwolterman@co.marion.or.us
Kaldrich@co.marion.or.us
CTate@co.marion.or.us

Roger Kaye
Friends of Marion County
P.O. Box 3274
Salem, OR 97302

Public Works LDEP Section (via email)
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mcldep@co.marion.or.us
JShanahan@co.marion.or.us

1000 Friends of Oregon
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Portland, OR 97204-2597

School District: (via email)
Fridenmaker_david@salkeiz.k12.or.us

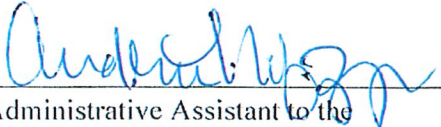
Pudding River Watershed Council (via email)
anna@puddingriverwatershed.org
cleanpuddingriver@gmail.com
County Agencies Notified:

Code Enforcement (via email)
CGoffin@co.marion.or.us

Assessor's Office (via email)
assessor@co.marion.or.us

State Agencies Notified: (via email)
Mike.I.mccord@wrđ.state.or.us
Gregory.j.wacker@oregon.gov

By mailing to them copies thereof. I further certify that said copies were placed in a sealed envelope addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon on the 9th day of September, 2025, and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer