



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: March 1, 2017

Department: Public Works Agenda Planning Date: Feb. 23, 2017 Time required: 5 min.

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Consider an order approving Conditional Use (CU) Case 16-014/Klopfenstein

Issue, Description & Background Conditional Use Case 16-014 is a request to modify conditions of the approval in CU 78-80, to lift the employee cap and add non-farm vehicle repair to a previously approved farm equipment and machinery repair business located on a 1.00 acre parcel in an Exclusive Farm Use zone at 12175 Selah Springs Road NE, Silverton. On September 7, 2016, the hearings officer held a public hearing on the matter and on November 3, 2016, issued a decision denying the request. On November 16, 2016, that decision was appealed to the board. The board accepted the appeal and held a public hearing on January 18, 2017. After having considered all the information in the record the board reversed the hearings officer's decision and granted the Conditional Use subject to meeting certain conditions. To complete the process a final order signed by the board is needed.

Financial Impacts: None

Impacts to Department & External Agencies None

Options for Consideration: 1. Approve the order as written. 2. Direct staff to make changes to the order. 3. Take no action at this time.

Recommendation: Staff recommends the order be approved as written.

List of attachments: * Order with attachments * Hearings officer's decision

Presenter: Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to: Joe Fennimore gfennimore@co.marion.or.us

**BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY, OREGON**

In the Matter of the)	Case No. CU 16-014
Application of)	Clerk's File No: 5716
Walter and Karen Klopfenstein)	Conditional Use

ORDER

This matter came before the Marion County Board of Commissioners at its regularly scheduled public meeting on January 18, 2017, to consider the appeal of the application of Walter and Karen Klopfenstein for a conditional use to modify conditions of approval in CU 78-80 to lift the employee cap and add nonfarm vehicle repair to a previously approved farm equipment and machinery repair business approved as a commercial activity in conjunction with farm use on a 1.00 acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 12175 Selah Springs Road NE, Silverton, Marion County, Oregon (T7S, R1W, S04D, tax lot 700).

On September 7, 2016, the hearings officer conducted a hearing on this application. On November 3, 2016, the hearings officer issued a decision finding that the applicant did not meet the burden of proving compliance with the applicable criteria and **DENIED** the conditional use application. On November 16, 2016, the applicant appealed the hearings officer's decision. The Board accepted the appeal and on January 18, 2017, the Board held a duly noticed public hearing.

The Board, after having considered the Planning Division's and Clerk's files, hearings officer's decision and the testimony and evidence in the record, makes the following Orders:

IT IS HEREBY ORDERED that the Board adopts the Findings of Fact and Conclusions of Law contained in Exhibit A attached hereto.

IT IS FUTHER ORDERED that the decision of the hearings officer denying the Conditional Use is hereby reversed and the Conditional Use is **GRANTED**, subject to the conditions contained in Exhibit B, attached.

DATED at Salem, Oregon this _____ day of _____ 2017.

MARION COUNTY BOARD OF COMMISSIONERS

Chair

Commissioner

Commissioner

JUDICIAL NOTICE

Oregon Revised Statutes, Chapter 197.830, provides that land use decisions may be reviewed by the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days from the date this Order becomes final.

KLOPFENSTEIN
CU 78-80 AMENDMENT OF CONDITIONS

FINDINGS

1. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The primary purpose of the designation and zoning is to promote the continuation of commercial agricultural and forestry operations.
2. The subject property is in the northwest corner of the Selah Springs Road NE-Cascade Highway NE intersection. Case CU 78-80 approved a commercial activity in conjunction with farm use on the property for farm equipment and machinery repair. The property is a legal parcel for land use purposes.
3. EFU zoned properties in farm use and small acreage homesites surround the subject property.
4. The *Soil Survey of Marion County Area, Oregon* shows 100% high-value farm soils on the subject property.
5. Applicants applied to modify CU 78-80 condition of approval 1 which disallows commercial servicing, repair and maintenance of automobiles, and to remove condition of approval 3 that allows no more than two full time equivalent workers to be employed in the business at any one time.

BACKGROUND

CU 78-80

In CU 78-80, Esther Utech (property owner) and Barry Butler applied for a commercial farm activity on the subject property to repair farm related equipment and machines.

The application was granted, with the following conditions of approval:

1. That the conditional use is granted only for the servicing of farm related equipment and vehicles. It does not include separate sales of any equipment or products aside from that customarily installed in the normal course of the service operation.
2. That all service work be confined to the approximate 40 by 50 foot building proposed.
3. That no more than two full time equivalent workers be employed in the business at any one time.

4. That access to the property be provided on Selah Springs Road only, away from its intersection with Cascade Highway. That adequate area be provided on the premises for off-street loading, turning, and parking to serve the use.
5. That approval for an acceptable means of sewage disposal to serve the use be obtained from the Department of Building Inspection prior to issuance of building permits. That all required building permits be obtained from the Department of Building Inspection.

ADDITIONAL FINDINGS AND CONCLUSIONS

1. The business is currently conducted within an approximately 40 foot by 40 foot pole building. The site was previously occupied by one of the original applicants in CU 78-80 who retired, thus leaving the community without access to the services. The former occupant of the property served the community well for over thirty-seven (37) years and the community relied on the availability of this service in a rural setting. The next nearest similar service is in Silverton and requires transportation of the farm vehicles through busy city streets, including a school zone and a heavily used commercial district.
2. Farmers in the area use farm equipment in their agricultural enterprises. Farms also use automobiles and pickup trucks for many of the farm needs.
3. The size of the property and the building will limit the amount of work that can be done. No farm-related purpose is served by limiting the number of employees to two (2) full-time equivalent workers.
4. The statutory warranty deed recorded in county records at reel 3780, page 310 shows Walter and Karen Klopfenstein own the subject property.
5. Walter and Karen Klopfenstein signed the application. MCC 17.119.025 is satisfied.
6. According to MCC 17.119.010, a conditional use is an activity that is similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. Review of proposed conditional uses ensures the uses will be in consonance with the purpose and intent of the zone.
7. According to MCC 17.119.030, if the use as proposed qualifies as a commercial activity in conjunction with farm use, the Board of Commissioners may approve the conditional use application if all criteria are met.
8. MCC 17.136 provisions are intended to carry out the purpose and intent of the EFU zone. If applicable MCC chapter 17.136 criteria are met, the proposed use would be in harmony with the purpose and intent of the zone. MCC 17.136(A) and (D) criteria are discussed below.

9. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:

- a) The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
- b) Adequate fire protection and other rural services are or will be available when the use is established.
- c) The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
- d) Any noise associated with the use will not have a significant adverse impact on nearby land uses.
- e) The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.

10. *Farm practices.* The farm uses on surrounding properties include grass seed, alfalfa, nursery stock, grapes, filberts and pasture. The current use has existed on the site for 38 years with no known conflict or negative effect. As conditioned, the use will not force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. There are no forest uses on surrounding properties.

11. *Adequate services.* Utility services, such as electric and telephone services are currently available to the area. Police services are provided by Marion County. The on-site water service (a well) is adequate for the needs of the use.

Subsurface sewage disposal is not allowed on the subject property. The prior occupant installed a 1,135 gallon wastewater holding tank on the property in 1978. Based on the size of the current 1,135 gallon holding tank, it would seem necessary to cap employees at six. Applicants accepted a six employee cap as reasonable at the hearing before the board. Customers seldom use the restroom. A pumping contract for the holding tank has been provided and is in the record.

12. The subject property fronts Cascade Highway and Selah Springs Road. Cascade Highway, according to the MCCP Marion County Rural Transportation System Plan (MCRTSP) appendix B, 2012 update, is a two-lane arterial road with 3' paved shoulders

and 28' paved travel surface within a 60' right-of-way. The road is in good condition and operates at level of service (LOS) B. Selah Springs Road is a two-lane local road with 1' gravel shoulders and 20' paved travel surface within a 40' right-of-way. The road is in good condition and operates at LOS A. No access to Cascade Highway was allowed in the prior case and Marion County Land Development Engineering and Permits (LDEP) will not allow Cascade Highway access now. LDEP is requiring vegetation removal to improve sight distances. Access is off a minor road operating at LOS A, and it would take a tremendous increase in traffic to bring the road to LOS D or F. As long as applicants take access only from Selah Springs Road NE, and clear and maintain vegetation to meet sight distance requirements, roadway service is adequate.

13. *Significant adverse impact.* The subject property is not within an identified special watershed, groundwater limited, floodplain, geologic hazard, wildlife or big game habitat area. Subsurface sewage disposal is not allowed on the subject property.
14. The business occupying the site has an oil burning heater which disposes of used oil products. All other potential contaminants are regularly picked up regularly for lawful disposal off site.
15. *Noise.* Limited hours of operation and requiring all repairs to be performed in the building will mitigate noise producing activities.
16. *Water impounds / mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the property.

MCC 17.136.060(D)

17. Under MCC 17.137.060(D), commercial activities in conjunction with farm use are subject to the following criteria:
 1. The commercial activity must be primarily a customer or supplier of farm uses.
 2. The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.
 3. The agricultural and commercial activities must occur together in the local community.
 4. The products and services provided must be essential to the practice of agriculture.
18. Farm vehicles are those owned by the operator of a farm in the local agricultural community and employed to some degree in some aspect of the farm operation. Many farmers do not register their vehicles as farm vehicles for a variety of reasons.

Imposing a requirement that farm vehicles be registered as farm vehicles as a condition in this case would result in unfairness to the local farm community as well as the applicant.

19. Although the 75% farm-related sales is a reasonable standard for determining whether the use constitutes a commercial use in conjunction with farm use, failure of the use to maintain 75% of sales to the local agricultural community in a given year should not, in itself, be grounds to terminate or disallow the use as approved, unless sales to the local agricultural community fall below 51%.
20. In May 2016, applicants provided services 86 times with gross receipts of \$28,718.58. Applicant attributed \$15,053.27 to farm related repairs, for a 52.4%/47.6% farm/nonfarm income percentage. But, of the 86 repairs, 31 were farm-related and 55 were nonfarm-related.
21. *Enhance farming enterprises in local agricultural community.* The local agricultural community has depended on the repair business at this site. Having a nearby farm repair business will save time and money for local agricultural enterprises.
22. *Occur together in the local community.* The area of the subject property is an area of farm zoning and farm uses. The agricultural and commercial activities will occur together in the local community.
23. *Products and services essential to the practice of agriculture.* Farms can be highly mechanized and keeping equipment in running order is important to farm operations.

EXHIBIT B

The Marion County Board of Commissioners adopts the following conditions in Conditional Use Case # CU 16-014/Klopfenstein.

CONDITIONS: The following conditions must be satisfied:

1. No more than 25% of the gross income generated by the business shall come from the repair of non-farm automobiles or other non-farm related vehicles. Farm vehicles are those vehicles licensed by the Oregon Department of Motor Vehicles as a farm vehicle, with a farm identification number on the vehicle title, or vehicles registered to an individual who works on a farm and presents adequate documentation that the vehicle is used in some capacity to carry out the business of the farm operation. All other vehicles are considered to be non-farm vehicles.
2. The applicant shall maintain detailed records of repairs that indicate the type of vehicle being repaired, the fee charged for the repair including parts and labor, and the date of repair. In the case of vehicles licensed as a farm vehicle, the license plate number and name of the farm the vehicle is licensed to is also required. In the case of pickup trucks and other vehicles that may be used for non-farm purposes, the records shall also include the license plate number, vehicle owner's name and address, and farm name and address, if the vehicle is associated with a farm. If no farm is noted, the vehicle will be considered a non-farm vehicle. The records shall be maintained on the premises and shall be made available to representatives of Marion County upon request.
3. The applicant shall submit an annual report of income records to the Planning Director by March 15th for the previous calendar year. The report shall include a list of customers with vehicle owners name, address vehicle is registered to, address and farm name where the vehicle is used, and whether it is for agricultural use. The report shall also include a summary that indicates total gross income and percent of income that is generated from repairing farm vehicles. The report shall be signed by a person responsible for keeping the financial records of the business with the following certification: "I hereby declare under penalties of false swearing (ORS 162.075 and 162.085) that all the above information and statements transmitted herewith are true; and acknowledge that any permit issued on the basis of this report may be revoked if it is found that any such statements are false". This report is required for the years 2017, 2018, and 2019. If the use complies with Condition #1 for these three years, no further reporting is required. Failure of the use to maintain 75% of sales to the local agricultural community in a given year shall not, in itself, be grounds to terminate or disallow the use as approved, unless the sales to the local agricultural community fall below 51% for two consecutive years.
4. In addition to any other remedies available to the county, failure to continuously comply with the conditions of approval may result in this approval being revoked. Any revocation could be appealed to the county hearings officer for a public hearing.
5. The maximum number of persons employed by the business shall be limited to six.
6. The applicant should contact Silverton 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.

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. CU 16-014
)
Application of:) Clerk's File No.
)
WALTER & KAREN KLOPFENSTEIN) **Conditional Use**

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Walter and Karen Klopfenstein to modify conditions of approval in CU 78-80 to lift the employee cap and add nonfarm vehicle repair to a previously approved farm equipment and machinery repair business approved as a commercial activity in conjunction with farm use on a 1.00 acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 12175 Selah Springs Road NE, Silverton, Marion County, Oregon (T7S, R1W, S04D, tax lot 700).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 117.110, 17.119, 17.122 and 17.136.

III. Public Hearing

A public hearing was held on this matter on September 7, 2016. The Planning Division file was made part of the record. Planning file CU 78-80 was also made a part of the record. The record remained open until September 21, 2016 for applicants to submit additional information. The following persons appeared and provided testimony on the application:

1. Brandon Reich Planning Division
2. Donald Kelley Applicant's attorney

The following documents were marked and entered into the record as exhibits:

- Ex. 1 Two pages of petition signatures
- Ex. 2 Undated letter from Casey Stadel
- Ex. 3 September 13, 2016 letter from Darlene Huddleston, with attached map
- Ex. 4 September 19, 2016 letter from Mathew Buchheit

No objections were raised as to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at hearing. However, the hearing notice did not mention the requested employee cap removal. On any appeal the employee cap removal must be put in the notice to ensure the public is properly informed about the scope of the conditional use proposal.

IV. Findings of Fact

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

1. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The primary purpose of the designation and zoning is to promote the continuation of commercial agricultural and forestry operations.
2. The subject property is in the northwest corner of the Selah Springs Road NE-Cascade Highway NE intersection. Case CU 78-80 approved a commercial activity in conjunction with farm use on the property for farm equipment and machinery repair. The property is a legal parcel for land use purposes.
3. EFU zoned properties in farm use surround the subject property.
4. The *Soil Survey of Marion County Area, Oregon* shows 100% high-value farm soils on the subject property.
5. Applicants ask to modify CU 78-80 condition of approval 1 which disallows commercial servicing, repair and maintenance of automobiles, and to remove condition of approval 3 that allows no more than two full time equivalent workers to be employed in the business at any one time.
6. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

The Marion County Public Works Land Development and Engineering Permits Section (LDEP) commented that approval of the proposed conditional use would allow modifications to conditions of approval for case CU 78-80 approving repair of equipment to also allow for the repair of automobiles on a 1.0 acre parcel in an EFU zone. LDEP provided the following informational requirements:

ENGINEERING REQUIREMENTS

- A. In accordance with Marion County Driveway Ordinance #651, driveways must meet sight distance, design, spacing, and safety standards. The following sub-requirements, numbered #1 and #2, pertain to access.
 - 1) The original approval stipulated access only from Selah Springs Road; no new access from Cascade Hwy will be allowed.
 - 2) It is required to clear brush and grassy vegetation on either side of the Selah Springs business access in support of adequate Intersection Sight Distance to the east, and including a small yet highly overgrown tree at the nearby intersection, as well as west down Selah Springs Road. Within 45 calendar days from the date of an approved *Notice of Decision*, the

Applicant shall either provide sufficient photographic proof of adequate clearing or contact PW Engineering for an inspection.

- B. The subject property is within the unincorporated area of Marion County and may be assessed Transportation System Development Charges (SDCs) per Marion County Ordinance #00-10R, which are due as a condition of issuance of building permits and/or change-in-use. Assessment of SDCs is typically based on building square footage.

(Emphasis in the original.)

The Marion County Building Inspection Division Onsite Sewage Disposal Program commented:

The tank at 12175 Selah Springs Road was installed and approved in 1978. Conditions for installation and use of the tank included:

- 1) Average daily sewage flow not greater than 200 gallons, and a tank large enough to hold a minimum of seven days sewage flow or 1000 gallons, whichever is larger. The anticipated use by two employees plus occasional customers was estimated at that time to be about 100 gallons per week. There is nothing in the record to indicate the two-employee limit was a condition of the holding tank permit.
- 2) A contract for pumping and disposal. The contract was to be renewed for as long as the tank was in use. As of this date, all holding tanks are required to maintain a pumping contract and submit an annual report to this office. Marion County has no record of a current pumping contract or annual report for this address.

My comments are as follows:

- 1) A PUMPING CONTRACT IS REQUIRED FOR THE LIFE OF THE HOLDING TANK. Current pumping records must be submitted for review by this office at this time. This will enable this office to provide meaningful input on how many additional employees could be added without exceeding the flow limit.
- 2) Currently, installation of a holding tank requires a volume of at least 1500 gallons and a daily flow limit of 200 gallons per day. This would correspond to a maximum of eight employees based on current standards of design flow (Table 2). However, the daily flow amount at this address is not known without the pumping records.
- 3) If daily flow rates are not found to be excessive, continued use of the 1000-gallon tank could be approved for additional employees. A 1500-gallon tank would not be required unless the use is found to be excessive.

Marion County Code Enforcement commented that the land use application is a result of a complaint received about an auto repair business operating at the site. "Inspection to the property and a conversation with the business owner confirms they are repairing personal auto's and no farm related. I'm not sure if land use can approve this."

The Silverton Fire District commented:

The Silverton Fire District has received notice to modify conditions of a conditional use from 1978 to allow for repair of automobiles. The Silverton Fire District has the following comments in relation to establishing a commercial repair facility. In order for the Fire District to allow approval of the parcel should be re-zoned from Exclusive Farm Use to something more appropriate. Also the building should be evaluated and change of use applied by the building department to ensure conformance with all appropriate codes for such occupancy. Any changes and or upgrades should be made to ensure fire and life safety since this is just a pole building not designed for such use. Once the building is classified and occupancy is designated by the building department then the Fire District can accurately look at the structure for Fire Code compliance.

Until these items have been addressed and complied with it is the Fire District's recommendation to not approve this use.

All other contacted agencies either did not respond or stated no objection to the proposal.

V. Additional Findings of Fact and Conclusions of Law

BURDEN OF PROOF

1. Applicants have the burden of proving 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 at 394-95 (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.)

Applicants 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' burden is not met and the application is denied. If the evidence for every criterion is a breath in applicants' favor, the burden is met and the application is approved.

BACKGROUND

CU 78-80

2. In CU 78-80, Esther Utech (property owner) and Barry Butler applied for an allied commercial farm activity on the subject property to repair farm related equipment and machines. The reasons for request state:

I have equipment I repair of my own and have worked on the farm equipment of most of the people in the surrounding area and they have expressed interest in such a service in this area. This property has been made available [] through them.

Since this property is too small to farm (1 acre) and has been turned down for a sewer permit for a residence and is on a corner of an intersection of two county roads; this property has not and could not be effectively used for anything else in this area.

There is a wholesale plant nursery on the same intersection and there are many similar farm structures in the area so this structure would not be out of place there.

Since it is on an intersection of two county roads there will be two entrances or exits available for use, so there will be no effect on normal traffic flow.

The application was granted, with the following conditions of approval:

1. That the conditional use is granted only for the servicing of farm related equipment and vehicles. It does not include separate sales of any equipment or products aside from that customarily installed in the normal course of the service operation.
2. That all service work be confined to the approximate 40 by 50 foot building proposed.
3. That no more than two full time equivalent workers be employed in the business at any one time.
4. That access to the property be provided on Selah Springs Road only, away from its intersection with Cascade Highway. That adequate area be provided on the premises for off-street loading, turning, and parking to serve the use.
5. That approval for an acceptable means of sewage disposal to serve the use be obtained from the Department of Building Inspection prior to

issuance of building permits. That all required building permits be obtained from the Department of Building Inspection.

APPLICANT PROPOSALS AND PLANNING DIRECTOR DECISIONS

3. In the subject application, applicants ask to modify conditions of approval in CU 78-80. In their supporting statement, applicants explain they want to alter the existing commercial activity in conjunction with farm use by including nonfarm related automobile and pickup truck repair and by removing the current employee cap. Applicants state:

The Applicants adopt the discussion and findings of the hearings officer's decision in CU 78-80 to the extent that they are not inconsistent with this application. The business is currently conducted within an approximately 40 foot by 40 foot pole building. The site was previously occupied by one of the original applicants in CU 78-80 who recently retired, thus leaving the community without access to the services. The former occupant of the property served the community well for over thirty-seven (37) years and the community relied on the availability of this service in a rural setting. The next nearest similar service is in Silverton and requires transportation of the farm vehicles through busy city streets, including a school zone and a heavily used commercial district.

All farmers in the area do use farm equipment in their agricultural enterprises. Virtually every farm also uses automobiles and pickup trucks for many of the farm needs, e.g., farmers seldom drive a tractor or harvester into town to do banking, to shop at Wilco, etc. It must be recognized that passenger vehicles and pickups used in a farm context and by farmers are also a form of farm equipment or a farm vehicle. The Applicants should be allowed to operate or rent to a business that repairs passenger vehicles and pickup trucks as well as other farm equipment and heavy trucks. Indeed, the ability to service such vehicles is an important part of making the business commercially viable. It is also requested, that any business operating on the property be allowed to service non farm-related vehicles as long as the primary business is that of servicing farm-related equipment and vehicles.

There is also no reason that the number of employees should be limited to two (2) full-time equivalent workers. The size of the property and the building will limit the amount of work that can be done and will therefore dictate the number of employees. No farm-related purpose is served by limiting the number of employees to two (2) full-time equivalent workers.

4. The Planning Director approved the application but imposed conditions, including:

1. No more than 25% of the gross income generated by the business shall come from the repair of automobiles or other non-farm related vehicles. Farm vehicles are those vehicles licensed by the Oregon Department of Motor Vehicles as a farm vehicle, with a farm identification number on the vehicle title. All other vehicles are considered to be non-farm vehicles.
2. The applicant shall maintain detailed records of repairs that indicate the type of vehicle being repaired, the fee charged for the repair including parts and labor, and the date of repair. In the case of pickup trucks and other vehicles that may be used for non-farm purposes, the records shall also include the license plate number and farm identification number on the vehicle in order to qualify as farm vehicle repair income. The records shall be maintained on the premises and shall be made available to representatives of Marion County upon request.
3. The applicant shall submit income records to the Planning Director in June and December of each year for the previous six month period that indicates total gross income by month and percent of income that is generated from repairing farm vehicles. This report may be terminated at the discretion of the Planning Director when sufficient evidence of compliance with Conditions 2 and 3 has been provided.
5. Applicants asked the Planning Director to reconsider his decision and substitute the following conditions to make them conform more closely to Marion County Board of Commissioners (BOC) order 02-40, CU 01-38 (Rowat):
 1. Once a year, for three years, on March 15th the applicant shall submit a list to the Planning Division of all customers that purchased products or services at the site during the preceding calendar year. The list shall specify the name and address of the purchaser, or address of where the vehicle or equipment will be used, and whether it is for agricultural use. The report shall be signed and certified before a notary public. This report/list is required in 2017, 2018 and 2019. If, after the three years the use continues to comply with condition #2, no further reporting is required.
 2. Failure to maintain 75% farm-related sales and services to the local agricultural community, as determined by the Planning Manager from the yearly report/list, shall require the applicant to apply for an administrative review to reevaluate whether the use continues to constitute a commercial use in conjunction with farm use. Although the 75% farm-related sales is a reasonable standard for determining whether the use constitutes a commercial use in conjunction with farm use, failure of the use to maintain 75% of sales and services to the local agricultural community in a given year shall not, in itself, be grounds to terminate or disallow the use as approved, unless sales and services to the local agricultural community fall below 51%.

3. Farm vehicles are those owned by the operator of a farm in the local agricultural community and employed to some degree in some aspect of the farm operation.

6. Applicants' counsel states:

With regard to condition number 3 above, I am informed that most farmers do not register their vehicles as farm vehicles for a variety of reasons and that imposing such a requirement as a condition in this case would result in unfairness to the local farm community as well as the applicant. The intent of the ordinance and the statute is to allow a commercial use to benefit the local agricultural community. The previous condition would not do this but would have the opposite effect. The needs of the ordinance and the statute are met through the reporting requirements which are proposed.

7. The Planning Director's reconsideration decision includes the following conditions of approval:

1. No more than 25% of the gross income generated by the business shall come from the repair of non-farm automobiles or other non-farm related vehicles. Farm vehicles are those vehicles licensed by the Oregon Department of Motor Vehicles as a farm vehicle, with a farm identification number on the vehicle title, or vehicles registered to an individual who works on a farm and presents adequate documentation that the vehicle is used in some capacity to carry out the business of the farm operation. All other vehicles are considered to be nonfarm vehicles.
2. The applicant shall maintain detailed records of repairs that indicate the type of vehicle being repaired, the fee charged for the repair including parts and labor, and the date of repair. In the case of vehicles licensed as a farm vehicle, the license plate number and name of the farm the vehicle is licensed to is also required. In the case of pickup trucks and other vehicles that may be used for non-farm purposes, the records shall also include the license plate number, vehicle owner's name and address, and farm name and address, if the vehicle is associated with a farm. If no farm is noted, the vehicle will be considered a non-farm vehicle. The records shall be maintained on the premises and shall be made available to representatives of Marion County upon request.
3. The applicant shall submit an annual report of income records to the Planning Director by March 15th for the previous calendar year. The report shall include a list of customers with vehicle owners name, address vehicle is registered to, address and farm name where the vehicle is used, and whether it is for agricultural use. The report shall also include a summary that indicates total gross income and percent of income that is generated from repairing farm vehicles. The

report shall be signed by a person responsible for keeping the financial records of the business with the following certification: "I hereby declare under penalties of false swearing (ORS 162.075 and 162.085) that all the above information and statements transmitted herewith are true; and acknowledge that any permit issued on the basis of this report may be revoked if it is found that any such statements are false".

This report is required in 2017, 2018, and 2019. If the use complies with Condition #1 for these three years, no further reporting is required.

8. Applicants' appeal states the Planning Director's decision imposes a higher standard for percentage of farm related business than previously set by the Board of Commissioners. Applicants state that condition 3 should include the following provision:

"Although the 75% farm-related sales is a reasonable standard for determining whether the use constitutes a commercial use in conjunction with farm use. [sic] Failure of the use to maintain 75% of sales to the local agricultural community in a given year shall not, in itself, be grounds to terminate or disallow the use as approved, unless sales to the local agricultural community fall below 51%."

PRELIMINARY MATTERS

APPLICATION

9. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The statutory warranty deed recorded in county records at reel 3780, page 310 shows Walter and Karen Klopfenstein own the subject property and could file this application. MCC 17.119.020 is satisfied.
10. Under MCC 17.119.025 a conditional use application shall include signatures of certain people, including the owner of the subject property. Walter and Karen Klopfenstein signed the application. MCC 17.119.025 is satisfied.

AUTHORITY

11. Under MCC 17.119.100, the Planning Director has the power to decide applications for all conditional uses listed in MCC title 17. Under MCC 17.119.140, after the Planning Director's final action on the application, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's decision on reconsideration was mailed on July 29, 2016. Applicants appealed the decision on August 12, 2016. Applicants' appeal was timely.
12. Under MCC 17.119.150, if the director's decision is appealed, the hearings officer or shall conduct a public hearing in accordance with MCC chapter 17.111. The hearings officer may hear and decide this matter.

VIABILITY OF THE 1978 CONDITIONAL USE

13. In looking at a conditional use application, all applicable code provisions are examined. MCC 17.119.080 incorporates MCC 17.122.070 through 17.122.130 relating to variances into the conditional use process. These criteria "shall apply where applicable to the granting of conditional uses." Under MCC 17.122.100:

Discontinuance of the exercise of any right heretofore or hereafter authorized by any [conditional use] for a continuous period of six months shall be deemed an abandonment of such [conditional use], and the property affected thereby shall be subject to all the provisions and regulations of this title applicable to the district or zone in which such property is located at the time of such abandonment.

Conditional uses do not run in perpetuity and cannot be resurrected under an old approval if the use is discontinued for a period of six months. A new conditional use application would be required. Applicants' statement in support of the application says the previous occupant served the area "for over 37 years" and "recently retired" but does not say how "recently." In exhibit 2, submitted by applicants at hearing, Casey Stadel of Selah Springs Farms, states that the man who owned the business "died of cancer a few years ago." And, "[w]e have been lost without him in the last years and have had to tow broken equipment through town..." (Emphasis added.)

Six months is a short time period. Applicants' statements appear to narrow down the timeframe somewhat but by being open ended they also raise up the possibility of abandonment. Mr. Stadel's comments indicate the area has been without a farm machinery and equipment repair business at the site for a few years. **Applicants have not proven by a preponderance of evidence in the record that the previously approved conditional use was not abandoned under MCC 17.122.100. The conditional use application is denied.**

14. If, on appeal, applicants provide sufficient evidence showing the conditional use was not abandoned, the hearings officer provides advisory comments on the merits of the application.

CRITERIA

MCC 17.119.010

15. According to MCC 17.119.010, a conditional use is an activity that is similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. Review of proposed conditional uses ensures the uses will be in consonance with the purpose and intent of the zone.

MCC 17.119.070

16. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:

- (A) That the hearings officer has the power to grant the conditional use;
- (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
- (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.

17. Under MCC 17.119.030, the hearings officer (and BOC) may hear and decide only those applications for conditional uses listed in MCC title 17. Applicants ask to change conditions of an approved commercial activity in conjunction with farm use in an EFU zone. MCC 17.136.050(D)(2) lists a commercial activity in conjunction with farm use subject to MCC 17.136.650(D) as a conditional use in the EFU zone. If the use as proposed qualifies as a commercial activity in conjunction with farm use, the hearings officer (and BOC) may approve the conditional use application if all criteria are met.

18. MCC 17.136.010 contains the EFU zone purpose statement:

The purpose of the EFU (exclusive farm use) zone is to provide areas for continued practice of commercial agriculture. It is intended to be applied in those areas composed of tracts that are predominantly high-value farm soils as defined in OAR 660-033-0020(8). These areas are generally well suited for large-scale farming. It is also applied to small inclusions of tracts composed predominantly of non-high-value farm soils to avoid potential conflicts between commercial farming activities and the wider range of non-farm uses otherwise allowed on non-high-value farmland. Moreover, to provide the needed protection within cohesive areas it is sometimes necessary to include incidental land unsuitable for farming and some pre-existing residential acreage.

To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.

To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-033-0130 and in some cases more restrictive criteria are applied to ensure that adverse impacts are not created.

Non-farm dwellings generally create conflicts with accepted agricultural practices. Therefore, the EFU zone does not include the lot of record non-farm dwelling provisions in OAR 660-033-0130(3). The provisions limiting non-farm dwellings to existing parcels composed on Class IV - VIII soils [OAR 660-033-0130(4)] are included because the criteria adequately limit applications to a very few parcels and allow case-by-case review to determine whether the proposed dwelling will have adverse impacts. The EFU zone is intended to be a farm zone consistent with OAR 660, Division 033 and ORS 215.283.

MCC 17.136 provisions are intended to carry out the purpose and intent of the EFU zone. If applicable MCC chapter 17.136 criteria are met, the proposed use would be in harmony with the purpose and intent of the zone. MCC 17.136(A) and (D) criteria are discussed below. The hearings officer finds that not all criteria are met.

19. The conditional use application is denied so no conditions are applied. If the BOC approves the proposal on any review, carefully considered conditions may be imposed.

MCC 17.136.060(A)

20. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the SA zone:

1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
2. Adequate fire protection and other rural services are or will be available when the use is established.
3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.

21. *Farm practices.* Under *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), a three-part analysis is required to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

Applicants did not identify specific farm or forest uses or farm or forest practices on surrounding lands devoted to farm or forest use. Applicants state they "adopt the discussion and findings of the hearings officer's decision in CU 78-80 to the extent they are not inconsistent with this application." Applicants' approach requires the hearings officer or other review authority to guess which findings applicants believe support this application and why. Applicants provided little information about on site activities and whether the potential expansion or deletion of previously approved and specifically limiting conditions will have significant negative impacts on area farm and forest practices. Applicants do not provide substantial evidence that allows the county to conduct a proper *Schellenberg* analysis. The hearings officer would find this criterion is not met.

22. *Adequate services.* Utility services, such as electric and telephone services are currently available to the area. Police services are provided by Marion County. Applicants do not discuss on-site water service, but should provide this information on any appeal to ensure a complete record.

Subsurface sewage disposal is not allowed on the subject property. The prior occupant installed a 1,000-gallon wastewater holding tank on the property in 1978. Installation and use conditions for the tank included an average daily sewage flow not greater than 200 gallons and a seven-day storage capacity. At that time, the anticipated use by two employees plus occasional customers was estimated at about 100 gallons per week. A pumping and disposal contract to be renewed for as long as the tank was in use was required. Holding tank users are now required to install 1,500-gallon tanks with a 200-gallon daily flow limit, have a pumping contract, and submit an annual pumping report to the Marion County On-site Sewage Disposal Program office. The county has no record of a current pumping contract or annual report for the current on-site tank. The On-site Sewage Disposal Program office also noted that current 1,500-gallon holding tank and 200-gallon per day flow limit corresponds to a maximum of eight employees.

Based on the size of the current 1,000-gallon holding tank alone, it would seem necessary to cap employees at somewhere around five to six (roughly two-thirds of 8 employees based on a septic tank two-thirds the size of a currently required 1,500-gallon tank). Applicants accepted a six employee cap as reasonable at hearing. Employees may need to be further capped depending on the number of customers generated by nonfarm vehicle repairs.

Applicants provided a farm/nonfarm breakdown of repair and service work for May 2016. Of 86 customers in May 2016, 55 were nonfarm customers. Applicants need to show that adequate septic service can be provided with the requested extra employees and the significant increase in customers attributable to the nonfarm side of the business. If applicants provide adequate specific information on anticipated septic flow to show feasibility of the use, conditions of approval need to include provision of the most current and future pumping records, a pumping contract for the life of the holding tank, and review and approval by the Marion County On-site Sewage Disposal Program office.

The subject property fronts Cascade Highway and Selah Springs Road. Cascade Highway, according to the MCCP Marion County Rural Transportation System Plan (MCRTSP) appendix B, 2012 update, is a two-lane arterial road with 3' paved shoulders and 28' paved travel surface within a 60' right-of-way. The road is in good condition and operates at level of service (LOS) B. Selah Springs Road is a two-lane local road with 1' gravel shoulders and 20' paved travel surface within a 40' right-of-way. The road is in good condition and operates at LOS A. No access to Cascade Highway was allowed in the prior case and Marion County LDEP will not allow Cascade Highway access now. LDEP is requiring vegetation removal to improve sight distances. Applicants do not discuss or estimate the number of anticipated increased daily traffic trips to the property. Applicants just say the size of the parcel and on-site building will limit the size of the use even though added employees could work in shifts, generating more employee and customer traffic. Lack of specificity like this is usually cause for concern (see the on-site sewage discussion above). But, here property access is off a minor road operating at LOS A, and it would take a tremendous increase in traffic to bring the road to LOS D or F. As long as applicants take access only from Selah Springs Road NE, and clear and maintain vegetation to meet sight distance requirements, roadway services would be adequate.

The Silverton Fire District has concerns about the proposed use because the operation is in "just a pole building not designed for such use." The Fire District does not believe it can accurately look at the structure for Fire Code compliance until the building department evaluates it and ensures conformance with appropriate occupancy codes. Once the building is classified and occupancy is designated, the Fire District says changes or upgrades can be made to ensure proper fire and life safety compliance. Until then, the Fire District recommends denial of the application. With conditions requiring Building Inspection review and fire protection plan approval by the Silverton Fire District within 60 days from the effective date of an approval order the criterion might be met.

Applicant should further address sewage disposal, water availability and fire/life safety concerns on any appeal to the BOC.

23. *Significant adverse impact.* The subject property is not within an identified special watershed, groundwater limited, floodplain, geologic

hazard, wildlife or big game habitat area. Subsurface sewage disposal is not allowed on the subject property. On-site sewage storage is regulated by the building department, and applicants must comply with all applicable requirements. Applicants should address containment, storage and disposal of products that could contaminate land or groundwater resources if released into the environment.

24. *Noise.* Applicants did not address noise attributable to the expansion of the business to determine if nonfarm vehicle repair and staff increases will lead to noise generation in excess that allowed in MCC chapter 8.45 (Noise). Limited hours of operation and other noise mitigating restrictions should be discussed because lifting the employee cap and increasing the customer base could result in compounding noise producing activities and lead to shift work which could increase noise exposure.
25. *Water impounds/mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the property.

MCC 17.136.060(D)

26. Under MCC 17.137.060(D), commercial activities in conjunction with farm use are subject to the following criteria:
 1. The commercial activity must be primarily a customer or supplier of farm uses.
 2. The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.
 3. The agricultural and commercial activities must occur together in the local community.
 4. The products and services provided must be essential to the practice of agriculture.
27. *Primarily a customer or supplier of farm uses.* The original conditional use approval allowed only farm related equipment and machine service and repair, making the primary connection to farm use a pretty easy determination. Adding the nonfarm component makes the determination more difficult. Identifying farm versus nonfarm vehicles can be complicated, as shown by applicants and the Planning Directors back and forth opinions. The Planning Director first looked at Oregon Driver and Motor Vehicle Services Division (DMV) issued farm vehicle registration plates as the way to distinguish farm and nonfarm vehicles. Applicants protested that not all farm use vehicles are registered under farm plate statutes, and using that as a sole determiner would not properly distinguish between farm versus nonfarm vehicles and equipment. The Planning Director revised requirements to also include vehicles registered to individuals who work on a farm and present adequate documentation that the vehicle is used in "some capacity"

to carry out farm operation business. If the first attempt was too restrictive, this attempt may be overbroad because it includes vehicles used in a farm operation in "some capacity." Some capacity is a low bar, and it seems a condition should at least require qualifying vehicles to be "primarily" used in a farm operation. More information is needed to allow a decision maker to properly craft a definition of farm and nonfarm vehicles, equipment and machines.

The Planning Director approved a 75%/25% farm/nonfarm gross income split as a way of determining whether farm users are the primary users of applicants' services. A 75%/25% split is used for farm stands and some other farm zone uses. This may work well in cases where a business sells candy bars, cans of pop and t-shirts along with its produce, but may not work as well in the context of farm and nonfarm vehicle service and repair. Farm equipment is often large and expensive and repairs and parts replacement may also be large and expensive, leaving it difficult fashion a method of ensuring the farm user is the primary customer. Applicants provided farm/nonfarm vehicle work breakdown for May 2016 that the Hearings Officer accepts on its face for example purposes. The breakdown illustrates potential difficulties in evaluating the farm versus nonfarm primary customer criterion.

In May 2016, applicants provided services 86 times with gross receipts of \$28,718.58. Applicant attributed \$15,053.27 to farm related repairs, for a 52.4%/47.6% farm/nonfarm income percentage. But, of the 88 repairs, 31 were farm-related and 55 were nonfarm-related, for a 36% farm/64% nonfarm customer split. Who then is the business primarily serving, farmers or non-farmers? More information on the nature of the business may help the BOC evaluate this criterion and fashion a method of ensuring it can be met.

28. *Enhance farming enterprises in local agricultural community.* Having a nearby farm repair business will likely save time and money for local agricultural enterprises. But, overrunning the business with nonfarm customers may make the operation less efficient for farm customers. Determining how to keep the business primarily beneficial for agricultural users requires more information and evaluation.
29. *Occur together in the local community.* The area of the subject property is an area of farm zoning and farm uses. The agricultural and commercial activities will occur together in the local community, but the city of Silverton is nearby and urban customers may also be attracted to the business at this EFU zoned site.
30. *Products and services essential to the practice of agriculture.* Farms can be highly mechanized and keeping equipment in running order is important to farm operations. But, it is yet to be determined whether farm or nonfarm users will be primary users of the business, and thus whether the business is essential to the practice of agriculture.

31. Under MCC 17.110.680:

No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation.

This application resulted from a complaint of an automobile repair business operating in a farm zone. Inspection of the premises by a Marion County Code Enforcement officer revealed that all automobile and no farm repair was taking place on the premises. If an adequate method of allotting, tracking, and enforcing a proper farm/nonfarm split can be crafted, approving this expansion could resolve the code enforcement issue.

CONCLUSION

32. Applicants must first prove their proposal can be considered as a modification of the previously approved conditional use rather than as a new conditional use. If the previous use was abandoned by a period of discontinuance for six months or more, a fresh conditional use application is required. Whether considered a new use or an expansion or alteration of an old use, applicants must provide enough detailed information to give the decision maker the ability to render a proper decision.

VI. Order

It is hereby found that applicants have not met the burden of proving applicable standards and criteria for approval of a conditional use application to modify conditions of approval for a commercial activity in conjunction with farm use have been met. Therefore, the conditional use application is **DENIED**.

VII. 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 Street NE, Salem) by 5:00 p.m. on the 18th day of November 2016. 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 at Salem, Oregon, this 3rd day of November 2016.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Darlene Huddleston
12142 Selah Springs Rd. NE
Silverton, OR 97381

Lorenzo & Tammy Perez
3871 Brush Creek Dr. NE
Silverton, OR 97381

Earl & Colleen Veach
P.O. Box 1944
Silverton, OR 97381

Walter & Karen Klopfenstein
3732 Cascade Highway NE
Silverton, OR 97381

Matthew Buchheit
6122 Brush Creek Dr. NE
Silverton, OR 97381

Ron Parvin
Silverton Fire District
819 Rail Way NE
Silverton, OR 97381

Agencies Notified
Planning Division (via email)
Public Works Engineering (via email)
Building Inspection (via email)
Code Enforcement (via email)
Environmental Services (via email)
AAC Member No. 7

Dawn Olson
15056 Quall Road
Silverton, OR 97381

James Sinn
3168 Cascade Hwy NE
Silverton, OR 97381

Donald Kelley
110 North Second Street
Silverton, OR 97381

by mailing to them copies thereof, except as specified above for agency notifications. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 3rd day of November 2016, and that the postage thereon was prepaid.



Christi Klug
Secretary to Hearings Officer