

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, September 14, 2022
9:00 a.m.

Senator Hearing Room
555 Court Street NE
Salem, OR 97301

PRESENT: Commissioner Danielle Bethell, Commissioner Colm Willis, and Commissioner Kevin Cameron. Also present were Jan Fritz, chief administrative officer, Scott Norris as county counsel, and Brenda Koenig as recorder.

Commissioner Bethell called the meeting to order at 9:02 a.m.
Commissioner Cameron left the meeting at 9:15 a.m.

(Video Time 00:02:18)

PUBLIC COMMENT

Jack McFadden:

- Mr. McFadden expressed the following:
 - He lives in a suburban area close to the brush fire that occurred on Friday, September 9, 2022;
 - There was no information provided to residents that were being evacuated:
 - No information regarding the fire levels was provided;
 - He received notification of the fire via a text from a friend;
 - He traveled via automobile to a good viewing point to establish how close the fire was to his residence;
 - The brush fire was in a suburban area with multiple homes located in the vicinity; and
 - He made the decision to evacuate after viewing the proximity of the fire to his residence.
 - A Marion County Sheriff's Officer in the area was not able to provide any information regarding the fire:
 - He was informed that the command center was located at Crossler Middle School;
 - He was not familiar with the school's location or how to arrive at the school;
 - He had to navigate his way to the command center at night and in the dark;

- He encountered multiple law enforcement agencies stationed at the school upon arrival, but no officers were able to provide any information regarding the brush fire;
 - He was advised to inquire on the Marion County website for emergency information related to the fire:
 - He checked the website for three days and found no information related to the brush fire.
- He was also advised that evacuees were being directed to Judson Middle School for help:
 - He was not familiar with the school's location or how to arrive at the school;
 - He had to navigate his way to the school at night and in the dark;
 - Upon arrival at the school, he was not able to gain access to the building because the doors were locked; and
 - Law enforcement stationed at the school did not have access to the building.
- An estimated 2,000 residents had been directed to evacuate, and required temporary shelter:
 - The closest lodging option that he could locate was in the City of Corvallis.
- He was advised that the Red Cross did arrive at Judson Middle School, but with only one cot in their possession;
- The complete lack of information pertaining to the brush fire crisis was concerning:
 - No information was provided to television stations regarding the fire and the evacuation process for over 2,000 residents; and
 - Evacuation level three covered an area estimated to be six miles away from the tower site with homes in sporadic locations.
- The Marion County Sheriff's Office (MCSO) did not send information out to their deputies;
- Area residents were made aware of the evacuation level on the website of a television news station after they had returned to their homes:
 - The information was not provided by a law enforcement officer;
 - The information was not provided on the county's website; and
 - Evacuees had no public information for the following:
 - What to do;
 - Where to go; and
 - A status for the brush fire.
- Mr. McFadden expressed that most of the evacuees were closer to the City of Independence which provides some of the following:
 - A large park that contains a hotel; and
 - A civic center that contains public meeting rooms.

- A large portion of the fire evacuation area is located within Polk County.

Board discussion:

- Regret was expressed for the insufficient evacuee information;
- County staff is working on an after-action report for the brush fire;
- Mr. McFadden expressed that there was no helpful emergency information related to the brush fire on the county's website;
- The county's public communications team will work to ensure that the website information is more robust;
- The information provided by Mr. McFadden was informative and helpful;
- The county uses an emergency response system that sends messages to residents' cell phones:
 - Mr. McFadden had previously signed up, but he did not receive any messages related to the brush fire:
 - Staff will investigate why he was not receiving emergency messages.
- Mr. McFadden expressed that the tower utilized by cell phones may have been completely overwhelmed with calls from emergency responders and area residents:
 - Cell phone service for area residents may have been transferred automatically to another jurisdiction not located near the fire.
- No lives were lost, and no homes were damaged in the brush fire; and
- The county will work to improve their emergency response process.

(Video Time 00:15:41)

Motion: Commissioner Willis moved to add an item to the Consent Agenda: Approve an order delegating authority to the Chief Administrative Officer to transfer a parcel of land from Marion County to the Marion County Housing Authority. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 00:16:05)

CONSENT

BOARD OF COMMISSIONERS

Board Committee Appointments - Marion County Public Safety Coordinating Council

1. Approve orders reappointing Jayne Downing, Alison Kelley, and Oregon State Representative Rick Lewis and appointing Elizabeth Infante to the Marion County Public Safety Coordinating Council (MCPSCC) with terms ending September 14, 2025.

2. Approve election allocations for Secure Rural Schools (SRS) and Community Self Determination Act funding for federal fiscal year 2022; Title I, Title II, and Title III.

G:\BOARD SESSIONS\BOARD SESSION MINUTES\2022\9-14-2022

Approve an order delegating authority to the Chief Administrative Officer to transfer a parcel of land from Marion County to the Marion County Housing Authority. **(Motion made and approved to add this item to the Consent Agenda)**

MOTION: Commissioner Willis moved for approval of the consent agenda. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 00:16:51)

ACTION

BOARD OF COMMISSIONERS

3. Consider approval of the Oregon Department of Veterans' Affairs (ODVA) county grant application for ODVA funds in the amount of \$229,437 for fiscal year 2022-23. –Matt Lawyer

Summary of presentation:

- Before the board is consideration of the Oregon Department of Veterans' Affairs (ODVA) County Grant Application for fiscal year 2022-23;
- The county's allocation funds are for veteran services that are contracted through the Mid-Willamette Valley Community Action Agency;
- The ODVA grant award for 2022-23 is \$229,437;
- Marion County has allocated \$51,014 in county funds for the services;
- Carry forward funds from the prior year are approximately \$36,288; and
- Staff recommended approval of the grant application for ODVA funds for fiscal year 2022-23.

Board discussion:

- This is the final year for the contract with the current provider;
- A Request For Proposal (RFP) will occur in the future for a new Contract for Services; and
- Organizations are encouraged to consider submitting a proposal.

MOTION: Commissioner Willis moved to approve the Oregon Department of Veterans' Affairs (ODVA) county grant application for ODVA funds in the amount of \$229,437 for fiscal year 2022-23. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 00:19:02)

HEALTH AND HUMAN SERVICES

4. Consider approval of Amendment #8 to the Contract for Services with Advanced Security, Inc. to add \$400,000 for a new contract total of \$1,745,000 for unarmed security and patrol services for five Marion County locations through June 30, 2023. –Rhett Martin

Summary of presentation:

- Advanced Security, Inc. plays a key role in client and employee safety;
- The company provides unarmed security and patrol services for five Marion County Health and Human Services (MCHHS) locations including:
 - The Silverton Road facility in the City of Salem;
 - The City of Woodburn facility;
 - Two facilities located on Beverly Avenue in the City of Salem; and
 - The Psychiatric Crisis Center in the City of Salem.
- MCHHS has nearly expended the current contract amount of \$1,345,000;
- The county is billed approximately \$350,000 annually for unarmed security and vehicle patrols; and
- If approved the \$400,000 in additional funds will provide funding through June 30, 2023.

Board discussion:

- The original contract term period was from June 2017 through 2019:
 - The contract allowed for term date extensions with the not to exceed date of June 2023.
- The prior contract amendments allowed for some of the following:
 - Adding or removing locations;
 - Clarifying contact information;
 - Extending in two-year increments; and
 - Adding funds.
- Amendment #8 may be the final amendment to the contract;
- MCHHS anticipates a future contract will go through a Request For Proposal (RFP) process; and
- The current contract expires on June 30, 2023.

MOTION: Commissioner Willis moved to approve Amendment #8 to the Contract for Services with Advanced Security, Inc. to add \$400,000 for a new contract total of \$1,745,000 for unarmed security and patrol services for five Marion County locations through June 30, 2023. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 00:21:39)

PUBLIC WORKS

5. Consider an ordinance to amend Chapter 15.10 of the Marion County Code to update the county's Construction Erosion and Sediment Control ordinance to be consistent with the county's National Pollutant Discharge Elimination System permit. –Matt Knudsen and Max Hepburn

Summary of presentation:

- The National Pollutant Discharge Elimination System (NPDES) permit is a federally required permit:
 - The county must apply for the permit that allows for discharge into state waters;
 - The permit contains the following six parts:
 - Outreach and education;
 - Public involvement;
 - Construction erosion;
 - Post-construction;
 - Illicit discharge; and
 - Good housekeeping within Marion County Public Works.
 - Non-compliance of the permit may result in a \$25,000 fine per day and per violation.
- The amendment to the code is required for the county to achieve permit compliance;
- The county's Stormwater Engineering Standards Project originated approximately five years earlier:
 - The requirements were developed by the following:
 - Marion County Public Works staff;
 - The Department of Environmental Quality (DEQ);
 - Local home builder associations; and
 - Other individuals and agencies.
 - It was important to ensure that impacts to Marion County would be relevant to the proposed regulations:
 - The regulations needed to make sense and be clear.
- County goals for the construction erosion and sediment control ordinance include some of the following:
 - Increase clarity for the following:
 - Home builders;
 - Developers;
 - Property owners; and
 - County staff.
 - Meet the minimum standards that are required by the DEQ:
 - A consulting firm helped ensure that the county was meeting the minimum requirements.
- The outreach process for developing the ordinance and future engineering standards included the following:
 - Internal reviews with the following:

- Marion County Code Enforcement;
 - Marion County Legal Counsel; and
 - Marion County Public Works staff.
 - Three Management Update meetings;
 - Two Work Session meetings; and
 - Meetings with the Marion Water Quality Advisory Committee (MWQAC) whose members consist of the following organizations and individuals:
 - The Home Builders Association;
 - Watershed councils;
 - The agricultural community; and
 - At-large members within the community.
- The process for adopting the amendment to the code and the engineering standards entails the following:
 - Today is the first reading of the ordinance; and
 - The second reading of the ordinance will be at a future board session:
 - The board will have the option to approve an ordinance that adopts the engineering standards.
- Currently the NPDES permit requires the county to regulate storm water in the following areas:
 - Urban density areas surrounding the City of Salem; and
 - The unincorporated Butteville community.
- For developers or home builders this entails erosion control on construction sites or any areas where runoff could occur due to land disturbance;
- The best management practices utilized for erosion control include:
 - Covering ground surfaces;
 - Stabilizing;
 - Revegetating;
 - Wattles; and
 - Silt fences.
- The amendment will be for Marion County Code that originated in 2010:
 - The code focuses on the following two areas:
 - Large developments with one or more acres; and
 - High risk sites that may have the following:
 - Unstable soils;
 - High slopes; or
 - Areas located within a buffer of a waterway.
 - The intent of the code is to reduce turbidity in surface waters that are discharged into state waterways; and
 - The existing code prohibits displaced soil erosion and sediment from construction sites.
- The current program entails the following and is administered through the Marion County Public Works, Land Development Engineering and Permits group:

- Working through the process with builders and developers;
- Receiving the permits; and
- Performing compliance inspections.
- Changes to the construction erosion program include some of the following:
 - The applicability of the program has been simplified:
 - The high-risk area map has been eliminated; and
 - The option for a large development permit has been removed.
 - Reduced the ground disturbance threshold from one acre down to a quarter of an acre for areas that require a permit:
 - This will incorporate the following:
 - Smaller developments; and
 - Larger communities that have a 5,000 square foot trigger for ground disturbance.
 - The county will continue to participate and maintain its DEQ 1200-CN program status for project sites that contain one to five acres; and
 - The pathway for developers intending to sell independent lots, or independent phases of larger common plans of developments has been clarified:
 - The actual builder of a development phase is responsible, rather than the overall developer of the subdivision.
- The changes will increase expenses for developers and builders:
 - The cost is estimated to range from a few hundred dollars to a few thousand dollars:
 - The required dollar amount will depend on the erosion control measures that are needed.
- Changes to the permit process are minimal:
 - Five acres or more will require a DEQ 1200-CN permit;
 - The applicant is required to provide a plan on-site that details erosion prevention and sediment controls;
 - Plan adjustments and modifications may be necessary as project site conditions change; and
 - Regular county and applicant inspections are required.
- The following is the implementation plan to move forward with amending Chapter 15.10 of the Marion County Code if approved:
 - Early notification of the proposed ordinance has already been provided to builders and engineers:
 - Multiple builders and engineers participated in the development of the code and engineering standards.
 - Part of the inspection process will be to provide education and warnings, rather than immediate penalties; and
 - It is anticipated that the changes will simplify the process.
- Staff recommends that the board adopt the ordinance as proposed.

Board discussion:

- It is anticipated that the changes will streamline the process;
- Input from the community members that will be impacted has been beneficial;
- Developers will be negatively impacted:
 - Housing will be more expensive.
- The county has no control over the changes that will be implemented;
- A second reading and a final motion to amend Chapter 15.10 of the Marion County Code will be made at the September 28, 2022, Board Session meeting.

MOTION: Commissioner Willis moved that the chair read the ordinance by title only twice. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

The chair read the ordinance by title only twice.

(Video Time 00:37:55)

6. Consider approval of Amendment #1 to the incoming funds Intergovernmental Agreement with the Oregon Department of Transportation (ODOT) to add \$1,008,564.80 for a new contract total of \$1,124,000 of which an estimated amount of \$1,008,564.80 will be paid with federal funds and the county will provide an estimated \$115,435.20 for the Connecticut Avenue: Macleay Road to Rickey Street Pedestrian and Bicycle Improvement Project through March 15, 2030. –Ryan Crowther

Summary of presentation:

- The project is located in the City of Salem between Cordon Road and Lancaster Drive in proximity to Macleay Road;
- Currently there are sidewalks and bike lanes on the east side of the roadway;
- There are limited facilities on the west side of the roadway;
- The proposed project improvements entail some of the following:
 - Add sidewalks and bike lanes to the west side of the road;
 - Replace any non-compliant Americans with Disabilities Act (ADA) sidewalk ramps;
 - Upgrade the large concrete refuge island near the intersection of Connecticut Avenue and Macleay Road; and
 - Construct stormwater upgrades, treatment detention, and conveyance.
- Currently the contract is only funded for preliminary engineering;
- The amendment adds funding for the following:
 - Right-of-way acquisition; and
 - The project's construction phase.
- The federal funding for the project had an increase of \$837,180.80;
- The new project total estimate of \$1,124,000 is comprised of the following:
 - An estimated \$1,008,564.80 in federal funds; and

G:\BOARD SESSIONS\BOARD SESSION MINUTES\2022\9-14-2022

- An estimated \$115,435.20 in county funds:
 - This is a 10.27 percent match that is required for all federal projects.
- The project schedule entails the following:
 - Design occurred in 2020;
 - The right-of-way acquisition is scheduled for 2023; and
 - Construction is scheduled for 2024.

Board discussion:

- The project area was selected because its proximity to Houck Middle School:
 - A lot of children and pedestrians walk in the area; and
 - Bicycle traffic is heavy.
- The original source of the federal funds is unknown:
 - The funds are coming through the Salem-Keizer Area Transportation Study (SKATS) program.

MOTION: Commissioner Willis moved to approve Amendment #1 to the incoming funds Intergovernmental Agreement with the Oregon Department of Transportation (ODOT) to add \$1,008,564.80 for a new contract total of \$1,124,000 of which an estimated amount of \$1,008,564.80 will be paid with federal funds and the county will provide an estimated \$115,435.20 for the Connecticut Avenue: Macleay Road to Rickey Street Pedestrian and Bicycle Improvement Project through March 15, 2030. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 00:42:51)

7. Consider approval of the Public Improvement Agreement with Hamilton Construction Company in the amount of \$3,314,366 for the Construction of River Road South: Willamette River (Independence) Bridge Scour Repairs Project through December 31, 2025.
–Ryan Crowther

Summary of presentation:

- The project is located southwest of the City of Salem near the City of Independence;
- The bridge is one of the main bridges in the area that crosses over the Willamette River:
 - The bridge crosses over into Polk County.
- The project scope includes the following:
 - Constructing rip-rap and sheet pile scour column repairs to protect the piers from scour:
 - Scour is when the water moves silt and other river bottom material out from underneath the piers:
 - This can negatively impact the foundation of the bridge; and
 - Large rock will be utilized for the repairs.
 - Installation of the following:

- Temporary traffic control;
 - Erosion control for rivers;
 - Temporary work bridges;
 - Cofferdams;
 - Dewatering methods; and
 - An access road to get down to the bridge.
- The following will be restored once construction has been completed:
 - Impacted areas near the river; and
 - Vegetation which includes planting of the following:
 - Trees;
 - Shrubs; and
 - Seeds.
- Hamilton Construction Company provided the lowest bid for the project;
- The total project cost estimated at \$3,314,366, is comprised of the following:
 - An estimated \$2,973,981 in state funding:
 - This is 89.73 percent.
 - An estimated \$340,385 in county funding:
 - This is 10.27 percent.
- Construction will start in the summer of 2023:
 - The work cannot be done during the winter:
 - It needs to be performed during an in-water work window; and
 - Some preparation work will occur prior to construction.
- There is a future structural retrofit project for the same bridge that will be funded through another local bridge program in an upcoming year:
 - This funding will not be utilized for the structural retrofit project.

Board discussion:

- The project will not impact individuals utilizing the bridge:
 - The work will be occurring below the bridge; and
 - Signage will be placed to protect boaters.
- Future weight limitations are still under review and have not been determined yet;
- The bridge receives heavy usage from local farmers during harvest seasons:
 - Any bridge or lane closures could negatively impact local farmers; and
 - It was requested that public outreach to communities occur prior to the project and before any potential bridge or lane closures:
 - Public Works staff has implemented a robust outreach process that is performed before projects begin:
 - Multiple public meetings are held;
 - Letters are sent out to area residents; and
 - Notices are posted on Facebook.

MOTION: Commissioner Willis moved to approve the Public Improvement Agreement with Hamilton Construction Company in the amount of \$3,314,366 for the Construction of River Road South: Willamette River (Independence) Bridge Scour Repairs Project through December 31, 2025. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 00:48:18)

PUBLIC HEARINGS

9:30 A.M.

PUBLIC WORKS

A. Public hearing to consider an appeal of the hearings officer's decision denying Administrative Review (AR) Case #22-001/Dustin and Kanoe Barth. –Austin Barnes

Summary of presentation:

- The application is for an Administrative Review (AR) to place a primary farm dwelling on a 20-acre parcel in an Exclusive Farm Use (EFU) zone:
 - The parcel is located just outside of the City of Sublimity limits;
 - The parcel is on the east side of Dennison Road S.E.; and
 - It is approximately 0.3 miles north of its intersection with Coon Hollow Road.
- The applicants are proposing to place a primary farm dwelling on the subject property using the farm income standards;
- At the time of the application, the property was vacant and being farmed in conjunction with the land parcel located directly to the south:
 - The property is now being separately farmed with Christmas trees;
 - The property had approximately two acres of Christmas trees planted at the time of the application; and
 - Additional Christmas trees were planted after the application was submitted.
- The property was described by deed in its present configuration on June 5, 1974:
 - For land use purposes it is considered legal.
- Surrounding uses are farm uses in all directions:
 - All adjacent parcels are zoned EFU;
 - Adjacent land parcels have been planted with a variety of farm crops;
 - The area has a mix of farm parcels with dwellings, and farms parcels without dwellings; and
 - Most of the parcels in the area are over 40 acres, except for a few smaller parcels to the west.
- The Marion County Public Works, Planning Division requested comments from various governmental agencies with the following agencies responding:
 - Marion County Public Works Department, Land Development Engineering and Permits;
 - Friends of Marion County; and
 - Marion County Building Inspection.

- The property contains zero of the following:
 - Streams;
 - Wildlife habitat areas;
 - Geological hazards; or
 - Flood zones.
- It is anticipated that the proposal will not affect the following:
 - Air quality; or
 - Natural resources in the area.
- On February 23, 2022, staff gave a decision of denial based on the applicants' stating that the parcel had an income of \$80,250, with staff expressing the following:
 - It was not possible to raise the trees to a sellable height and maturity to generate this amount of income in the short time frame that they had been planted;
 - The trees would have been approximately two years old, but it takes approximately six to eight years for Christmas trees to mature to a sellable height;
 - The crop would have been diminished from the prior year's harvest on the small, planted area; and
 - Staff concluded the following:
 - That the future sale of a Christmas tree is not a harvested farm product; and
 - It does not constitute the sale of a farm crop as no crop has actually changed hands.
- The applicants filed for a reconsideration that was denied on March 17, 2022:
 - Supplemental information was submitted regarding invoices and dates of seedling purchases; and
 - The applicant printed a new narrative arguing that staff incorrectly determined that a crop must be harvested to constitute farm use.
- Staff concluded that a crop must be harvested to constitute farm use;
- Staff expressed that emails submitted to the applicant's attorney stated that the trees were sold six to ten years before maturity, at u-pick prices, but in a wholesale fashion;
- The Friends of Marion County organization submitted comment to staff expressing that the crops were sold to the parents of Ms. Barth, one of the applicants for the Administrative Review:
 - Concerns were expressed that the trees may not have been sold to an actual Christmas tree farmer; and
 - It is unknown if the trees will be sold in an open market.
- The original home building permit was applied for on September 28, 2021:
 - Staff reviewed the permit on November 4, 2021, but was unable to locate the following:
 - A homesite approval for the land parcel; and
 - An Administrative Review (AR):
 - Staff contacted the applicant inquiring about the AR:
 - An AR was submitted on January 6, 2022; and

- Staff was unsure of the applicant's intent to apply for a permit for a homesite.
- Staff expressed that without the crops being harvested off of the subject property, then the proposed home does not constitute a primary farm dwelling:
 - The request could potentially qualify in the future after crops have been harvested.
- Staff recommends denial of the application request.

Board discussion:

- Commissioner Willis had questions for Mr. Barnes and requested further discussion:
 - Planning staff's position that a crop must be harvested to constitute farm income has not been definitively held by the Oregon Supreme Court:
 - Planning staff's position is an internal interpretation of the code;
 - Staff has interpreted farm use as crops that must be harvested:
 - To date no harvesting has taken place.
 - Mr. Barnes read the definition of farm use from Oregon code that pertains to this case:
 - "The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops.
 - Many farmers have contracts and income before their crops are actually harvested;
 - The code states that applicants must have a certain amount of income:
 - The applicant's argument may be the following:
 - They have the income;
 - Their primary purpose of using the land is to raise, harvest, and sell Christmas trees; and
 - They have a contract for the trees.
 - Staff's position is that whatever is being grown must be harvested:
 - Having the income is not enough; and
 - The mature crops must be taken from the property.
 - Staff did not want to set a precedent and have individuals think the following:
 - A crop can be planted in the ground;
 - They may receive payment for the crop prior to the actual harvest;
 - A house may be built on the property before the mature crop is harvested; and
 - An immature crop may potentially be removed from the ground once the house is built.
 - There may be a situation where there is a guarantee that the crop will be harvested, and the farmer has been paid for the crop:
 - The receipt of payment prior to harvest may be interpreted as income; and
 - The property owner may feel they can now build a home on the property.

- There is no guarantee that trees will survive the six to eight years it takes to reach maturity and then be harvested;
- The Friends of Marion County organization provided evidence in a prior hearing that in Oregon, real property law states that a tree still in the ground is still considered property, and is not a product;
- Mr. Barnes expressed that he has received telephone calls from neighboring property owners that feel most of the seedlings may have died in the prior year's drought:
 - It is unknown if the trees will survive to maturity.
- Individuals may have an enforceable contract if the following occurs:
 - Payment has been received for the crop; and
 - The crops buyer's intent is to come and collect the crop after it is harvested.
- County staff received the contract for the actual sale and purchase of the Christmas trees within the last two weeks:
 - There was no contract prior to that;
 - There is no date certain for harvesting the trees; and
 - There is a lack of details in the contract.

(Video Time 01:04:12)

Testimony:

Opposition:

Roger Kaye:

- Mr. Kaye expressed the following:
 - He feels the applicants' tree sales agreement is a hastily drawn agreement that was signed and dated on September 12, 2022:
 - The buyer has agreed to purchase Christmas trees from the sellers' property located at 8020 Dennison Road SE in the City of Sublimity:
 - The address does not appear to exist in the City of Sublimity; and
 - The property does not have a dwelling on it.
 - The Oregon Secretary of State, Business Registration Database provided the following information:
 - Dustin and Kanoe Barth operate their business as Barth Brothers Tree Farm:
 - They electronically filed tax returns on December 1, 2020; and
 - The owner and seller of Barth Brothers Tree Farm is Kendal Barth.
 - The tree buyers are R&R Tree Sales, LLC:
 - They electronically filed tax returns on May 18, 2022; and
 - The owner and buyer of R&R Tree Sales Inc. is Rhonda Perry.
 - There is a personal relationship between the buyers and the sellers:

G:\BOARD SESSIONS\BOARD SESSION MINUTES\2022\9-14-2022

- Mr. Kaye believes this constitutes a suspicious transaction for the purpose of gaining a dwelling on the property; and
 - He feels this is a non-arm's length transaction.
- Under the sales agreement, if the seller does not sell the property, the seller agrees to place a deed restriction on the property reserving the rights to the 3,000 Christmas trees to the buyer:
 - He feels this is unusual and likely unenforceable;
 - There is no recorded deed restriction in the record of this case; and
 - He feels this is another attempt of the sellers and buyers to disguise a non-arm's length transaction as a legitimate business decision.
- He stated there is aerial photographic evidence showing that there were no Christmas trees harvested in the years of 2021 or 2022:
 - Crops are required to be harvested in two consecutive years; and
 - He feels the applicants have failed to substantiate this.
- Mr. Kaye requested that the record remain open for 14 days to allow enough time to review the agreement;
- The invoices and payments do not specify which property the trees were sold from:
 - There is no credible information that the trees were grown, harvested, and sold from the applicant's property where the dwelling will be constructed;
 - There is no indication of any agreement to buy or sell trees from the applicant's property in the recent agreement; and
 - A Google Maps aerial photograph of the parcel shows no indication of tree plantings for the following years:
 - In 2018, the year before the Barth's purchased the property;
 - In 2019; and
 - In 2021.
 - The map just shows a plowed or tilled field:
 - A neighboring property over the same two-year period shows a definite growth of trees; and
 - It also shows a definite removal of trees.
- There is no credible and real evidence to support the application; and
- Mr. Kaye requested to read a portion of a letter dated for September 14, 2022, into the record:
 - He expressed that the letter was sent on September 14, 2023, via email before the start of the Board Session meeting; and
 - The letter is from Mr. Andrew Mulkey, a staff attorney for the organization 1000 Friends of Oregon, **(Reference Attachment A)**.

Board discussion:

- More evidence that the applicants are actually farming the property would be beneficial;
- Mr. Kaye expressed the following:

- He interviewed a Christmas tree farmer located within Marion County;
- The farm has over 1,000 acres of Christmas trees;
- In the interview Mr. Kaye was advised of what the trees would have cost, and what they would have sold for at maturity:
 - They would have sold for a maximum of \$30 to \$40 per tree.
- The interviewed farmer said he would never accept contracts or write contracts for trees that are still planted; and
- The farmer would only accept contracts from customers he had previously done business with.
- Mr. Norris confirmed that the law does allow someone who makes \$80,000 on farm uses in two years to build a home, assuming they provide substantial evidence:
 - The home is considered a farm dwelling by statute;
 - It is codified in the county code; and
 - These are the applicable criteria that are the subject of this hearing.
- Commissioner Willis expressed the following:
 - He wants to support individuals in the community who may be trying to do something in compliance with the law:
 - The law must be followed, and evidence needs to be provided in the record to support that they are complying with the law.
 - The applicants in this case are not harming anybody;
 - They want to build a house on a piece of property that they own:
 - The law allows this under certain criteria.
 - If the applicant complies with the law, then they should be able to build a house.
- Mr. Kaye expressed that they have substantial evidence on the record:
 - A three-page letter describing the lack of evidence has been submitted.
- Mr. Kaye requested a 14-day open record period be allowed for review of the agreement; and
- Mr. Kaye feels the agreement is unenforceable.

(Video Time 01:36:15)

Testimony:

Support:

Fred Wilson:

- Mr. Wilson is employed by Kellington Law Group, PC and is representing the applicants;
- Mr. Wilson expressed that the hearings officer did decide that income can be earned from the sale of farm products before the product is removed from the ground;
- Yesterday the Friends of Marion County submitted that Ms. Barth's parents are the buyers:
 - It does not matter who the buyers are, and this is not the issue; and

- The issue is if you can count income from the prior two years for trees that will be removed years into the future.
- He feels there may be insinuations that this is not a real deal;
- The hearings officer agreed with the applicants that this is a real Christmas tree farm;
- The question is whether the applicants can count the income now; and
- Mr. Wilson expressed that the hearings officer agreed that the applicants can count the income now.

(Video Time 01:40:30)

Kanoe Barth:

- Ms. Barth is one of the applicants and one of the owners of Barth Brothers Tree Farm;
- They purchased the property in 2019, and in 2020 they started Barth Brothers Tree Farm, LLC and planted their first crop of trees;
- They currently have five acres of trees planted;
- They have put in a service road, and they have put in a business sign at the farm's entrance;
- In addition to their financial commitment to the cost of trees, the Barths have also invested an additional \$30,000 in farm equipment and supplies;
- The Barths have paid in full for another five acres of trees to be planted in 2023;
- They are in the process of applying for permits to build a farm use building for storing their farm equipment and supplies:
 - A portion of the building will be used to meet with vendors and conduct business;
 - They are expecting the building to be delivered this week; and
 - The building is an additional \$30,000 investment.
- They have invested a total of \$60,000 in their business from 2020 to present;
- The Barths were excited to start the tree farm and to have the opportunity to teach their four boys how to farm;
- Their tree farm will contribute to their family financially, and it will also contribute to the community in a positive way;
- Ms. Barth expressed that there seems to be some concern over their relationship with the buyers of their trees:
 - The buyers are Ms. Barth's parents.
- When the Barth's purchased the property, they researched what type of crop they wanted to put on their land:
 - They wanted it to be cost effective, but they also wanted it to be something that their family truly had an interest in raising.

(Video Time 01:44:33)

Dustin Barth:

- Mr. Barth is one of the applicants and one of the owners of Barth Brothers Tree Farm;
- As they continued to work on their business venture Ms. Barth's father became very ill, and it became clear that he would no longer be able to continue working and he retired early:
 - Ms. Barth's father was an accountant for 30 years, and understood the importance of making your money work for you; and
 - With her father's current health situation, Ms. Barth's parents decided to research alternative sources of income:
 - Ms. Barth's parents approached the Barths with the interest in purchasing trees at wholesale, to sell them in Oregon, California, and Hawaii:
 - Ms. Barth's father saw this as an opportunity to generate income with little physical responsibility;
 - Unfortunately, Ms. Barth's father passed in January of 2022;
 - Ms. Barth's mother is excited to continue the vision that she had with her husband; and
 - Ms. Barth's mother is not alone in the venture, as she has two sons that are willing to work with her in the selling of the trees.
- Mr. Barth's father owned 17 acres in the City of Sublimity where he grew Japanese maples and ornamentals:
 - Mr. Barth spent his childhood working in the nursery, and he has also worked with local grass seed farmers.
- He wants to give his children the same type of environment that he grew up in, and he wants to continue the family tradition of farming;
- It is hard to find farmland to purchase because farm property is often passed down within a family;
- It has been Mr. Barth's dream to continue the farming practice in his own family;
- Mr. Barth expressed that the Friends of Marion County brought up the address that they have for the property:
 - When Mr. Barth applied for permits for the home in September, the county gave him the address for the purpose of applying for the permits; and
 - He expressed that he was advised that the required documentation for the application would be a deposit slip for the income and receipt for the income for the two years of sale for the farm product.

Board discussion:

- The Barths have mostly Noble trees, but they also have some Frasers and some Nordmanns:
 - The 2023 planting will be mostly Nobles.

(Video Time 01:49:06)

Testimony:
Support:

Fred Wilson:

- When the case was before the hearings officer, the issue was whether or not you can count the \$80,000 income each year before the trees were harvested:
 - Mr. Wilson feels this was the only reason that county staff recommended denial;
 - He expressed that staff may not agree with the applicants; and
 - Mr. Wilson expressed that the hearings officer agreed with the applicants that the income can be counted, and it does not need to be the same year.
- Mr. Wilson expressed the hearings officer provided another reason for denial that had not been previously talked about:
 - It had to be commercially reasonable;
 - It had too not be potentially unenforceable; and
 - It had to be credible:
 - This is not criteria that is in the code; and
 - Therefore, the case cannot be denied for this reason.
- Mr. Wilson understands the concern that this is some sort of scam for the applicants to obtain a house:
 - This is why the applicants have presented evidence that they really do have a tree farm; and
 - Mr. Wilson expressed that the hearings officer agreed that the applicants have a tree farm.
- Mr. Wilson expressed that the hearings officer decided that the applicants earned the income from the sale of farm products on the property:
 - They received at least \$80,000 each year from the sale of trees from the property; and
 - That is all that is needed for approval.
- Mr. Wilson expressed that the hearings officer had additional problems, even though the applicants met the approval criteria:
 - The applicants needed to show that it was commercially reasonable, enforceable, and credible:
 - This violates the codification rule that says you can only deny something for a basis that is in the code; and
 - This is not in the code.
- The applicants have submitted evidence that shows that this was a commercially reasonable sale;
- Mr. Wilson expressed that the only expert who testified has more than 20 years of Christmas tree experience:
 - He expressed that the expert testified that it is perfectly reasonable to have a sale before the trees are harvested; and

- He expressed that the expert testified that the price was completely reasonable for the product that they are selling:
 - Prices have risen on Christmas trees, even before inflation; and
 - Trees can be difficult to obtain.
- Mr. Wilson felt that the hearings officer was speculating:
 - He feels the decision was based off the staff's belief that the prices were inflated.
- Mr. Wilson expressed that the Friends of Marion County argued that the applicants did not sell the trees based on the current height of the trees:
 - They did not harvest trees in 2021 or 2022;
 - Charging \$53 for unmaturing trees is not reasonable;
 - The applicants agree that trees that are two years old are not worth \$53 currently; but
 - The trees will be worth that amount in four to five years.
- This is a commercially reasonable deal;
- The deal does not have to be an arm's length transaction:
 - There is nothing in state statute or Marion County code that says this must be an arm's length transaction.
- Mr. Wilson expressed that the Friends of Marion County submitted outdated numbers for the price of trees:
 - They argue that the price is \$35 to \$40 for wholesale;
 - \$53.50 was a price from a couple of years ago before the prices went up, and before inflation;
 - He expressed that the hearings officer felt that the prices are higher;
 - The applicants have submitted evidence that the price of Nobles currently can range up to \$71 for wholesale:
 - He estimated that \$47 is the lowest price for lower quality trees.
 - Taking inflation into account, he feels the applicants have probably charged too little for their trees; and
 - He expressed that in yesterday's comments from the Friends of Marion County, the applicant's 2.37 planted acreage might be sufficient to yield the required income if the trees were grown to maturity.
- Mr. Wilson expressed that with inflation, the additional five years for growth, and with all the other evidence submitted, it is commercially reasonable;
- There has been a lot of discussion around a contract, even though there is no requirement for a contract:
 - The applicants provided a contract because the hearings officer had concerns:
 - The applicants do not have acreage in another location that they can get the Christmas trees from;
 - The applicants currently do not plan on selling the property; but
 - If they do decide to in the future, they agreed that they would put a restriction on the sale that the trees had to be saved for the buyers.

- The applicants have submitted evidence that shows that the prices for trees have increased:
 - Prices have increased as much as 30 to 40 percent for Christmas trees:
 - The increase is higher than inflation.
 - Trees are selling at some businesses for \$130 to \$160 per tree; and
 - He expressed that the buyers did not overpay for the trees.
- The evidence is overwhelming that the applicants are Christmas tree farmers:
 - They have planted the trees;
 - They have shown that the trees are in the ground; and
 - There will be more than enough trees to satisfy the requirements to sell to Ms. Barth's parents.
- The only thing in opposition is people speculating, and that is not evidence;
- Mr. Wilson expressed that there is overwhelming evidence that what is presented is exactly what the applicants plan on doing:
 - The applicants are people who want to farm;
 - There are enough roadblocks for people trying to farm; and
 - There is no need to bring in additional requirements.
- Mr. Wilson expressed that the Friends of Marion County submitted documents that Ms. Kellington submitted in a previous case that does not have anything to do with this case.

Board discussion:

- The following may be the greatest risks to the county if the board were to approve the application today, and it turns out that the applicants choose to not continue to farm the property once the home is built:
 - Other people might submit the same type of application:
 - The county could potentially have people buying smaller parcels of farmland to put a crop on, and then rip the crop out of the ground once a house is built on the land:
 - Farmland would be taken out of production.
 - Mr. Barnes expressed that the application may be appealed:
 - It is a precedent and what happens with the case after.

(Video Time 01:59:29)

Testimony:

Support:

Wendie Kellington:

- Ms. Kellington is the principal attorney at the Kellington Law Group;
- She has been cited as an expert in farm use cases:
 - She has 40 years of experience in law;
 - She has served for six years on the Land Use Board of Appeals (LUBA); and

- She has worked with 1000 Friends of Oregon on prior cases.
- The application before the board today is from a young family who has deep farming roots in Marion County:
 - They are trying to make a living as farmers;
 - They have produced evidence that they are farming;
 - There is no reasonable dispute here that they are farming:
 - They have trees in the ground that are looking healthy;
 - Google Earth images are taken years before they are published; and
 - Receipts have been provided for what has been planted on the property.
 - The following criteria have been met:
 - A tract of land that is farm use; and
 - An operator that earned \$80,000 in income in the last two years from the sale of farm products on that farm.
 - There is no way to claim that it cannot be determined where the income came from:
 - The income comes from the sale of trees on this property.
 - There is no rule in Oregon that says that in order to meet the income test the trees must be harvested;
 - There is also no test that says that the transactions cannot be between related parties:
 - If there were such a rule, Oregon would be in a lot of trouble as there are a lot of families in Oregon who do business with other family members; and
 - The business of farming is often a family business, and legacy businesses keep youth engaged:
 - This helps to ensure the businesses last.
 - There is no hidden agenda:
 - The address of the buyer was never hidden, and it was always the same address as where the applicants are currently living;
 - Ms. Kellington expressed that the hearings officer stated that the testimony of Dustin and Kanoe Barth is evidence without question that the Barths have every hope and intention of operating a Christmas tree farm, and raising their family on the farm property while engaging in a farming operation;
 - Ms. Kellington expressed that the hearings officer also stated that the Barths appear to have a genuine and heartfelt desire to have a Christmas tree farm for families to enjoy and make memories; and
 - The Barths' good intentions are not doubted or questioned by the hearings officer.
 - There should not be any question in this case that the applicants are farming:
 - They have made money; and
 - They are fully invested in producing a farm product on their property.

- Ms. Kellington stated that the board has everything they need to get to “yes” today, and she feels the record does not need to stay open; and
- If the record remains open, then the applicant will require the following:
 - A chance to respond to any new information provided by 1000 Friends of Oregon; and
 - An opportunity to write a final argument.

Board discussion:

Commissioner Willis expressed the following:

- Land zoned Exclusive Farm Use (EFU) is special in Oregon;
- One of the concerns of farmers in Marion County is that individuals like living in the country, but they do not necessarily want to farm;
- If a family member gives someone \$160,000, and they have a receipt for the sale of something on their farm, then they can build a house:
 - Potentially the county could have a lot of wealthy individuals buying small acreage, getting a receipt for \$160,000 from their parents, and then building a house;
 - From a policy wide perspective this would undermine what EFU land is;
 - He believes that the Barth’s are farmers and that they are not doing this.
- There needs to be some connection to the farm use;
- He agrees that the crop does not have to be harvested for the income to count;
- In most of the multi-year contracts, the farmers do not get paid a lump sum five years in advance, they get paid on a rolling basis:
 - Farmers do not always receive payment after harvest;
 - Farmers may not receive all the money for something that is going to be delivered 5 years into the future;
 - It does not need to be an arms-length agreement;
 - It does however need to be a binding contract;
 - A contract between family members must be an enforceable contract;
 - A concern may be who buys the Christmas trees five years in advance and pays upfront for the trees:
 - That does not mean that the parents in this case did not do it;
 - It does not mean that the money did not change hands;
 - It does not mean that they do not have every intention of picking up the trees in five years;
 - There needs to be a way to tie this to farm use that is enforceable; but
 - The county does not want wealthy individuals to be able to buy farmland just so they can build a home on the property.

(Video Time 02:13:40)

Testimony:
Support:

Wendie Kellington:

- The county has land use enforcement authority:
 - They can use the authority if it is determined that the transaction does not result in the sale of the trees; or
 - If the Barth's do not follow through on their farming obligations that they have made to the county in order to obtain their dwelling.
- Sometimes a farm management plan and other conditions of approval are required to receive a farm dwelling;
- Legally there is no reason why a county could not enforce the conditions of approval;
- Everyone has conditions of approval in a land use case;
- If the board decides to approve the request, the decision could be very fact intensive regarding the farm use and the investment that proves that there is an ongoing farm use on the property including:
 - Details of the \$30,000 equipment investment;
 - Details of the investment in trees over the years:
 - This would include the 5,000 perspective trees have already been purchased but are not yet in their possession.
 - Discussion of the circumstances surrounding the prior two years that resulted in the farm income including the following:
 - A pandemic that resulted in the following:
 - Supply chain shortages that still apply; and
 - Employee shortages that still apply.
 - Energy prices have increased dramatically; and
 - There is a shortage of Christmas trees.

Board discussion:

- The current law for EFU does not state that a crop must be sold commercially to justify the income;
- The hearings officer's decision states the following:
 - The subject tract is currently employed for farm use as defined in ORS 215.203, on which the farm operator earned at least \$80,000 from the sale of farm products in each of the last two years.
- There is nothing in the statute about the buyer;
- The definition of tract is the property that is subject to the application;
- Commissioner Bethell requested an explanation of the hearings officer's findings that state the following:
 - The hearings officer rejects that the applicants received income exceeding \$80,000 from the sale of farm products from the subject tract, as such a sale

transaction is not commercially reasonable, potentially unenforceable, and not credible:

- Mr. Norris expressed that he believes that the hearings officer is talking about the bonafides of the sale itself:
 - He does not believe the hearings officer is talking about whether the trees before they are severed is a farm crop; and
 - He believes the hearings officer is talking about the nature of the sales.
- Tree farmers often enter into a contract where they receive a percentage of the purchase price per tree that is planted:
 - The farmer is paid the remainder of the purchase price for whatever is harvested and sold:
 - This case is different because the buyer paid the entire assumed price up front; and
 - It is not relevant to the commissioners' decision whether or not the seller received the dollars up front or in increments.
- In the very first decision staff issued they did not speak to the credibility of the income because they wanted to strictly follow code:
 - Following the first decision, more information has come in.
- Staff feels that the decision should be based on the code:
 - The credibility information and the sale information are relevant to understand the case; but
 - It is staff's opinion that the case should not be decided on this.
- The commissioners want to protect farmland:
 - Individuals living on farmland should be able to harvest their crop; but
 - There are concerns with setting a precedence.

Commissioner Willis expressed the following:

- For this case, the commissioners are interpreting what constitutes farm use:
 - Staff's interpretation of farm use is that it requires raising, selling, and harvesting in order for it to qualify as farm use; and
 - He does not believe in this instance that it is called for in code.
- Raising and selling the crops qualifies as farm use because it is the primary purpose;
- He agrees with the hearings officer:
 - The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops does not countenance for him as being gifts:
 - Obtaining a profit in money is not the same as receiving a gift of money;
 - Obtaining a profit for money suggests that there is an exchange of value;
 - The applicant needs to provide evidence that it is not a gift; and
 - That there is a credible exchange of value.
- The hearings officer stated that the transaction needed to be commercially valid:
 - The transaction needs to be enforceable by both parties; and

- The county needs to be certain that it will be enforced.

(Video Time 02:29:39)

Brandon Reich:

- Until 1993 a farm dwelling could be established through a farm plan:
 - The plan stated that the farmer intended to invest in the property;
 - The farmer could make a certain amount of income based on the type of crop that was grown and harvested:
 - They were permitted to have a home; and
 - The farmer would follow through with the farm operation, raise the crop, and generate the income.
- The legislature took the farm plan away in 1993, and replaced it with the farm income test:
 - Some components of the farm income test are similar to the farm plan:
 - The farmer is investing in the property;
 - There is a crop;
 - There is a pending sale; but
 - The crop has not been harvested yet:
 - Not having harvested could be an issue, because it resembles a farm plan with the farmer stating that in the future he will be harvesting.
- A lot of farm contracts include a payment that is made once the crop is harvested:
 - There are multiple uncertainties with farming:
 - The health of the operator;
 - The weather;
 - The market; and
 - Sometimes there is no crop to provide:
 - There is often insurance to cover a crop that does not make it to harvest.
- The farm income test allows the income to be based on one of the following:
 - The previous two years;
 - The best of the previous three out of five years; or
 - An average of the previous three out of five years:
 - Different options are available to show the farm income.

Board discussion:

- In this instance, the parents purchasing the trees from their children and giving the children full price for the trees up front is concerning;
- The applicants stated they made a purchase of the seedlings:
 - The seedlings were planted;
 - Equipment was purchased; and

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- The applicant is moving forward with a farm structure.
- Prior to 1993, once a farm plan was in place and the home was built, there was no enforcement of the farm plan:
 - The county approved several applications under the farm plan; and
 - It is unknown if the approved parcels are still being farmed.
- At the time of the hearings officer's hearing there was no contract:
 - The hearings officer was concerned with the length of time it would take to harvest the trees:
 - In response to the hearings officer's concern, the applicants provided a contract.
- Another issue the hearings officer identified was the value of the trees being sold:
 - Evidence was provided today that the value is consistent with current prices.
- The applicants have addressed both of the hearings officer's concerns:
 - This may not address the board's concerns on how to differentiate between this application and other potential applications where there could be a contract for a sale of a crop that hasn't been harvested yet.
- Mr. Reich expressed that there is time to leave the record open and for the board to reconvene at a later date to consider the case:
 - The board could grant additional time for both the opponent and the applicant;
 - A decision is required to be made when the hearing is reconvened;
 - Opposition has requested that the record be left open:
 - It is not required for the applicant to agree with the request; but
 - The board is required to grant one week for rebuttal.
 - The case needs to be decided on by October 26, 2022; and
 - Documentation needs to be received by October 12, 2022.
- Commissioner Bethell expressed that she is inclined to leave the record open:
 - More time is needed to review the case and the information provided in this public hearing.
- Staff recommended the record be left open for the following:
 - Until September 21, 2022, for the opponent;
 - Until September 28, 2022, for the applicant; and
 - Reconvene the public hearing on October 19, 2022.

MOTION: Commissioner Willis moved to close the public hearing and leave the record open until September 21, 2022, for the opponent and September 28, 2022, for the applicant, and reconvene on October 19, 2022. Seconded by Commissioner Bethell; motion carried. A voice vote was unanimous.

(Video Time 02:40:03)

Commissioner Bethell adjourned the meeting at 11:40 a.m.



CHAIR


COMMISSIONER
Not Present At Meeting

COMMISSIONER

Board Sessions can be viewed on-line at

<https://www.youtube.com/playlist?list=PLSUQ1gg6M78UsBE3q6w4rdf59Z5rXkEi5>



By electronic mail

September 14, 2022

Marion County Planning Division
5155 Silverton Rd., NE
Salem, OR 97305
planning@co.marion.or.us

Re: Barth, AR 22-001

On behalf of Friends of Marion County, please accept the following testimony for the record in AR 22-001, application by Dustin and Kanoe Barth for a farm dwelling.

The Hearings Officer correctly concluded that the applicants do not qualify for a dwelling in conjunction with a farm use of the subject property.

Contrary to the applicants assertion, the Hearings Officer did not rely on uncodified criteria to deny the application. Rather, the applicants simply failed to provide credible evidence that they met the approval criteria for a farm dwelling. The applicants' argument that the decision maker cannot make a credibility determination is wrong. The applicant has the burden of proof and the burden of persuasion to establish that facts required to meet the approval criteria. In that context, the decision-maker absolutely has the ability to determine whether the evidence or statements presented by the applicant is credible and can be relied upon.

In this case, the hearings officer determined that the applicants did not provide credible evidence that the invoices, receipts, and expenditures were actually related to the sale of a farm crop grown on the subject property. Although the applicants produced evidence of a purported sale of farm crops, the Hearings Officer determined that "[t]he legitimacy of the sale transactions are at issue." In other words, although a total of \$160,000 appears to have changed hands, did the buyer actually intend the \$80,000 payments to be for the purchase of Christmas trees grown on the property? Given that the buyers are the applicants' in-laws, do the transfers actually represent payment for purchase of Christmas trees at all?

As the hearings officer pointed out, "[s]taff accurately notes that the acreage planted could not reasonably generate in excess of \$80,000 at market rate or large enough to support back-to-back years." It is also worth noting that the applicants' first round of Christmas trees planted died due to drought. The applicants have not shown that their most recent planting in 2022 survived the summer. In that case, there is no crop to sell. The applicants purport that they have sold the crop twice for successive years without actually showing that they can produce back to back

annual harvests of Christmas trees on the subject property in sufficient quantities to justify a market price of \$80,000.

In that context, the hearings officer correctly doubted whether the applicants' evidence actually met the approval criteria. The applicants' evidence that they deposited money in their account does not actually provide proof of farm income earned in each of the last two years in conjunction with farm use of the subject property. *See* ORS 215.283(1)(e), 215.279, and OAR 660-033-0135(4). Although the applicants can show that they received payments of \$80,000 for the last two years, the hearings officer questioned whether the applicants had demonstrated those payments actually represented income generated from the sale of trees that will be grown or harvested on the subject property. The hearings officer noted that "[t]he farm income test requires, in relevant part, that [the] operator earned at least \$80,000 in the last two years from the sale of farm products on the subject tract."

The evidence submitted by the applicants does not meet their burden. The hearings officer rejected the applicants' claims that they received income that exceeded \$80,000 from "the sale of farm products from the subject tract." The hearings official determined that the applicant's purported "sale transaction is not commercially reasonable, potentially unenforceable, and not credible." Among the reasons the hearings officer noted that the applicants failed to provide evidence the kind of business record that would accompany a legitimate transaction for the sale of trees, much less the sale of trees that will be harvested at a future date, from the subject property.

First, the applicants "did not submit any contracts for the sale of the Christmas trees." In other words, the applicants failed to provide substantial evidence of any "connection between the subject tract and the trees referenced in the invoices." *See* HO Decision (citing *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138 (1997) ("The evidence supporting the application must be such that a reasonable person could only conclude that that applicable criteria are satisfied"). The Hearings Official notes that "[t]here is no sales agreement or other document that establishes when the right of possession to the trees transfers, and who is responsible for the tremendous outlay of costs until the time of harvest and who is responsible for the harvest itself." In short, "[t]here are no documents to establish that" the amount of money claimed by the applicants as farm income "was produced by the Christmas trees on the subject tract." The invoice, combined with the claims by the applicants that they would deliver harvested trees at some unknown future date allow the applicant to "provide the contracted number of trees from any location and satisfy [the] obligation with respect to the sale." The business location for Barth Brothers Tree Farm is also not the same as the subject property, which raises the possibility that the invoices are for sales of trees grown somewhere other than the subject

property. The hearings officer concludes that the evidence simply does not show what the applicants need to show to satisfy state and local law:

“The evidence presented including the invoices and the cancelled checks suggest that the reported gross income was not from the production of Christmas trees on the subject tract based upon the present determination of the price per tree. The breadth of the purported transaction (length of time before harvest, enhanced value, absence of terms for delivery or acceptance) is not supported by the two invoices and the payments.”

In conclusion, the hearings official did not rely on factors outside of the approval criteria. The hearings official correctly concluded that the evidence provided by the applicant did not demonstrate compliance with MCC 17.136.030(A)(1)(b). The applicants also failed to demonstrate compliance with the nearly identical standards in statute and OAR (cited above).

Moreover, the applicants fail to demonstrate that they have any ongoing farm use of the property. The applicants have not shown that any of the trees planted in early 2022 have survived the extreme heat over the summer or could possibly be used to fulfill harvest or delivery of \$80,000 worth of Christmas trees to the applicants’ in-laws at some unknown future date. The applicants do not explain how they resolve the supposed payment for trees in 2021 that died. The applicants simply fail to demonstrate that the income they claim counts as farm income, much less farm income derived from a farm crop grown on the subject property. The applicant failed to demonstrate that the partial tax document submitted was ever actually filed with or received by the IRS. For that reason, an unfiled portion of a tax form does not provide substantial evidence of farm income from the subject property.

The recently executed contract does not provide substantial evidence of compliance with the approval criteria.

The newly executed “Christmas Tree Sales Agreement” from September 12, 2022 does not demonstrate compliance with the state and local criteria. First, the “Buyer” is a newly formed entity that was created *after* the payments made in the 2022 invoice or shown on the 2021 and 2022 Payment Receipts. *See* Ex-1 (showing articles of organization for R&R Tree Sales LLC filed in May 2022). For that reason, statements made in the sales contract are directly contradicted by the evidence in the record. The “Buyer” in the sales contract did *not* agree to purchase Christmas trees from the subject property in 2021 or in 2022. The “Buyer” named in



the contract did not exist in 2021 or in January 2022. Moreover, the Buyer and Seller share the same principle place of business. That continues to suggest that the businesses are not in fact unrelated and that any transaction between the two entities is not in fact an arms-length transaction between a legitimate buyer and seller. The applicants have not provided any evidence that R&R Tree Sales, LLC is actually in the business of selling harvested Christmas Trees.

Second, it is not clear whether a sales contract executed after the fact of a purported sale is even valid or enforceable. Again, many of the recitations in the sales contract are not accurate or true. The Buyer could not have agreed to purchase 1500 Noble Christmas Trees from Seller in 2021 or 2022. The Buyer did not exist on the dates those payments were made.

The sales contract does not demonstrate that the applicants satisfy the criteria required to approve a dwelling in conjunction with farm use on the subject property. The timing of the documentation is extremely suspect, and looks as though the applicant manufactured these transactions and belated sales agreement, not for the legitimate sale of Christmas trees, but instead to provide the appearance of compliance with the approval criteria required for a dwelling on farm land.

Finally, although it is possible for farmers and purchasers to contract for the sale of crops that have not yet been harvested, the possible future sale of Christmas trees from the subject property after these proceedings have concluded cannot be used to justify a decision to approve a dwelling in this case. As a matter of law, prior to harvest, the applicant cannot demonstrate that the "income" was actually derived from the sale of a farm crop. On its own, the sale of growing but yet unharvested Christmas trees does not provide evidence of a farm income earned from the subject property. That income is contingent upon the harvest and delivery of the trees. In this case, the county does not have a time machine, and cannot determine whether the income was actually earned from the farm use of the subject property. The applicant has not demonstrated that the harvest has or will occur. For that reason, the \$160,000 does not meet the applicable criteria.

Sincerely,

A handwritten signature in black ink that reads "Andrew Mulkey".

Andrew Mulkey
Staff Attorney
1000 Friends of Oregon
(503) 497-1000x138