MARION COUNTY BOARD OF COMMISSIONERS

# Board Session Agenda Review Form

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| Meeting date: | August 10, 2022 | | | | |
| Department: | Public Works | Agenda Planning Date: | July 28, 2022 | Time required: | None |
| ☐ Audio/Visual aids | None | | | | |
| Contact: | Lindsey King | Phone: | 503-566-4162 | | |
| Department Head Signature: | for Brandon Reich | | | | |

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| **TITLE** | Accepting appeal of Hearings Officer's decision denying Administrative Review (AR) Case 22-001/Dustin and Kanoe Barth, and scheduling a public hearing for September 14, 2022. |
| Issue, Description & Background | Administrative Review Case (AR22-001) was to establish a primary farm dwelling on a 20.0 acre parcel located in the 8000 block of Dennison Rd. SE, Sublimity.<br><br>On February 23, 2022 the Planning Director issued a decision of denial, and on March 17 the application was reconsidered and denied. Upon an appeal of the Planning Directors decisions the Marion County Hearings Officer held a duly noticed public hearing and issued a decision on July 7, 2022, denying AR22-001.<br><br>On July 22, 2022 the applicant appealed the Hearings Officers decision to the Board of County Commissioners Office with a statement and appropriate filing fee. |
| Financial Impacts: | None |
| Impacts to Department & External Agencies | None |
| Options for Consideration: | 1. Accept the appeal and remand the matter back to the hearings officer if the applicant grants a time extension of 30 days.<br>2. Accept the appeal and schedule a public hearing, the suggested hearing date is September 14, 2022.<br>3. Deny the appeal and uphold the hearing officer's decision denying the request of AR22-001. |
| Recommendation: | Staff recommends the board of commissioners receive notice of the appeal and schedule a public hearing for September 14, 2022. |
| List of attachments: | Copy of appeal<br>Copy of Hearings Officer's decision<br>Copy of planning directors recommendation |
| Presenter: | Lindsey King |

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

MARION COUNTY BOARD OF COMMISSIONERS

# Board Session Agenda Review Form

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| Copies to: | Lindsey King - lking@co.marion.or.us<br>Brandon Reich - Breich@co.marion.or.us |

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July 22, 2022



Marion County Board of County Commissioners
C/O Marion County Clerk
555 Court Street NE
Salem, OR 97301

**APPEAL OF HEARINGS OFFICER DECISION ARA 22-001**

Our office represents Dustin and Kanoe Barth (Barths), the applicants in ARA 22-001. This document requests that the Board of County Commissioners accept the appeal and approve the application. The Barths filed an application for a primary dwelling customarily provided in conjunction with farm use (farm dwelling) for their 20-acre property located at 8020 Dennison Road SE, Sublimity, OR 97385 (T8S, R 1E, Section 31, Tax Lot 100). The hearings officer denied the Barths' application on July 8, 2022. MCC 17.115.110(G) provides that "MCC 17.122.070 through 17.122.130 shall apply to any appeals from the decision of the hearings officer" on an administrative review. MCC 17.122.120(A) provides that an appeal "shall be filed in duplicate" and "state wherein the * * * hearings officer failed to conform to the provisions of this title." This appeal is filed in duplicate, and the following explains where the hearings officer erred.

## THE BARTHS SATISFIED THE FARM INCOME TEST

### A. The Hearings Officer's Decision

Dustin Barth is a City of Portland Police Officer, and Kanoe Barth is a health and wellness coordinator for seniors at a senior health and wellness center. Dustin Barth comes from a family with a background in agriculture and tree sales, and the Barths want to continue this family tradition by developing their Christmas tree farm

into a primary family business. Currently, they are living with relatives out of town, which makes running the Christmas tree farm more difficult. The Barths would like to build a home on their property to allow for more efficient agricultural use of the property.

In order to build a farm dwelling on their property, the Barths must satisfy MCC 17.136.030(A)(1)(a-d). The hearings officer found that the Barths satisfied all of the applicable approval criteria except MCC 17.136.030(A)(1)(b), which requires that the Barths "earned on the subject tract in the last two years * * * at least $80,000 in gross annual income from the sale of farm products." This is also known as the "farm income test."

There is no dispute that the Barths earned over $80,000 the last two years. The Barths submitted invoices from the buyers demonstrating that they sold Christmas trees to the buyers and that the buyers paid over $80,000 for the Christmas trees the last two years. The Barths also submitted their tax forms demonstrating that they paid taxes on the sale of the Christmas trees in 2021 (and will do the same for 2022). The primary issue in front of the hearings officer (and the basis of Friends of Marion County's arguments and the basis for staff's denial in the earlier stage) was whether the Christmas trees had to be harvested before the income from the sale could be counted towards satisfying the farm income test. After extensive briefing and argument from the parties, the hearings officer correctly determined that there is no requirement that farm products be harvested the same year they are sold to satisfy the farm income test:

> "Friends of Marion County's reading of the code is unreasonably narrow. Many crops are sold before harvest on fully executed contracts, including hops and corn. If the Christmas trees had reached maturity and a sale agreement was entered with the exchange of

money, but the trees had not yet been harvested, it seems unlikely that a challenge would be made regarding whether the Applicants had received income for the farm product.

"The current employment for the purpose of obtaining a profit in money does not require that the farm product be harvested the same year - only that there is a purpose to obtain a profit in money, which cannot be done without a harvest. Again, Applicants testified as to an intent to harvest the Christmas trees for the buyer in exchange for the funds received. Applicants have received payment in advance of harvest, but nevertheless, the Applicants received payment for the product on the subject tract.

"* * * * *

"There is no language in the Code that requires a Christmas tree to be harvested prior to producing income. Although crops must be raised and harvested to be sold, there is no requirement in the Code that the harvest occur before sale of the crop. A sale with payment in advance of delivery is still a sale, and *the Applicant did receive income for sale of a farm product on the subject property* * * *." Hearing Officer Decision 13-14 (emphasis added).

All that is required to satisfy the farm income test is that the applicant earn at least $80,000 two years in a row from the sale of farm products. The hearings officer found that the Barths earned $80,000 from the sale of Christmas trees on their property in 2021 and 2022. That should have been the end of the analysis and an approval granted.

Instead, the hearings officer took the additional step of questioning the "legitimacy" of the sales and determining whether the sales of the Christmas trees were "credible":

"Although the operator provided invoices and proof of payment exceeding $80,000 for the last two years, 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 is not

commercially reasonable, potentially unenforceable, and not credible." Hearings Officer Decision 15.

**B. The Hearings Officer's Decision Violated the Codification Rule**

A well-established rule of land use law is that a local government cannot deny an application on a basis that is not set forth in the applicable code - this is referred to as the Codification Rule. This is based on ORS 215.416(8)(a), which provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

There is nothing in the MCC or state statute or administrative rule that requires an applicant to demonstrate that a sale is "legitimate" or "credible." In fact, the hearings officer acknowledges that there is nothing in the MCC that allows second guessing of private business decisions:

> "Staff candidly admits that the legitimacy of the sale based on the inflated market rate of the farm product is 'not in our Code . . .'" Hearings Officer Decision 14.

The hearings officer appears to believe the price of the Christmas trees was inflated and there is no enforcement mechanism. Even if that were true (which it is not, as explained later) the hearings officer created an entirely new basis to deny the application that is not in the MCC. This violates the Codification Rule. *Waveseer of Oregon, LLC v. Deschutes County*, ___ Or LUBA ___ (LUBA No. 2020-038, August 10, 2020). As this was the only basis for the denial, if LUBA agrees that the Codification Rule prevents the hearings officer from denying the application on a basis not found in the code, then LUBA would almost certainly reverse the decision

and order the County to approve the application pursuant to ORS 197.835(10)(a), which includes an award of attorney fees.

### C. The Christmas Tree Sales Were Legitimate and Credible

As explained, there is no basis in state or local law for the hearings officer to second guess the business practices of the parties to a private business transaction. Even if there were, however, the hearings officer improperly found that the sales were not legitimate.

The hearings officer stated the sales price of the Christmas trees was inflated, but the decision does not explain why this is the case. The hearings officer cites staff's statement that the property could not generate $80,000 in sales in back to back years, but that statement from staff was based on the current growth of the Christmas trees – not when the trees will be ready to be harvested. Staff's position was that the sale of Christmas trees could not be counted towards the farm income test until the trees were actually harvested – not that there would not be $80,000 worth of Christmas trees when the trees were harvested. On the contrary, the sales price was perfectly reasonable. As we explained in our briefing, even using outdated prices supplied by opponents, the price for mature trees was well within reason. As applicants' expert testified at the public hearing, Christmas tree prices have risen significantly in the last few years, and even obtaining trees can be difficult.

There is no evidence that the sales were not "legitimate" or "credible" – only rank speculation from opponents. The only evidence from someone with extensive knowledge about the Christmas tree industry was from the applicants' expert Wayne Howe. Mr. Howe testified that the delayed harvest and sales price were more than reasonable. There is no evidence to rebut Mr. Howe's testimony. While the hearings officer faults the Barths for not having a more sophisticated contract, there is nothing in state or local law that requires a particular degree of detail in business transactions

– just that those transactions occurred (which they indisputably did here). If the Christmas trees are not provided upon maturity then the buyers would have an air tight case for damages against the Barths. The Barths submitted the invoices from the sales, the receipts of the payments from the buyers, and their tax return showing the payment was received and taxed. That is more than sufficient to demonstrate that the sales were "legitimate" or " credible." While the hearings officer may think the transaction was unwise, the land use system does not allow a hearings officer to substitute his or her judgment for private parties.

Finally, the hearings officer appears to have applied the wrong standard in determining whether the sales were "legitimate" or "credible." The hearings officer stated:

> "The evidence supporting the application must be such that a reasonable person could *only* conclude that the applicable criteria are satisfied." Hearings Officer Decision 16 (emphasis added).

While that would be the standard on appeal to LUBA of a final local government denial under the substantial evidence test, at the local level, when there is competing evidence the standard is which evidence is more persuasive. There is often substantial evidence on both sides of a case, and it is up to the decision maker to decide which evidence is more persuasive. Even if there were competing evidence in this case (which is a more than generous characterization of opponents' arguments), the hearings officer was required to weigh the competing evidence – not require applicants to show that a reasonable person could ONLY conclude that the approval criteria were satisfied. The hearings officer did not even discuss, let alone weigh, the Barths evidence – including the evidence from the only expert on Christmas tree farms – in making her decision.

The Barths respectfully request that the Board of County Commissioners accept this appeal and approve the application.

Sincerely,

Fred Wilson

BEFORE THE MARION COUNTY HEARINGS OFFICER

| | | |
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| In the Matter of the Application of: | ) | Case No. AR 22-001 |
| | ) | |
| DUSTIN AND KANOE BARTH | ) | **ADMINISTRATIVE REVIEW** |

# ORDER

## I. Nature of the Application

This matter came before the Marion County Hearings Officer on the application of Dustin and Kanoe Barth for an administrative review to place a primary farm dwelling on a 20.00-acre parcel in an EFU (Exclusive Farm Use) zone located in the 8000 block of Dennison Rd SE. Sublimity (T8S; R1E; Section 31; tax lot 100).

## II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Rural Zone Code, particularly MCC 17.136.060(A) and MCC 17.136.060(D).

## III. Hearing

A public hearing was held on the application on June 2, 2022. At the hearing, the Planning Division file was made a part of the record. The following persons appeared and provided testimony:

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| 1. | Austin Barnes | Marion County Planning Division |
| 2. | Fred Wilson | Attorney for Applicants |
| 3. | Dustin Barth | Applicant |
| 4. | Kanoe Barth | Applicant |
| 5. | Wayne Howe | Proponent |
| 6. | Guy Barth | Proponent |
| 5. | Roger Kaye | Friends of Marion County/Opponent |
| 6. | Dan Lawler | Attorney for Friends of Marion County |

No objections were raised to notice, jurisdiction, conflict of interest, exhibits, evidence, or testimony presented at the hearing. Additional submissions were included in the record and marked as Exhibits:

| | |
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| Exhibit 1: | Photographs of Barth Brothers Tree Farm; |
| Exhibit 2: | Applicants' Supplemental Hearing Memorandum; and |
| Exhibit 3: | Supplemental Letter was submitted by Friends of Marion County. |

At the conclusion of the public hearing, the record was closed.

## IV. Executive Summary

Applicants request for an administrative review to place a primary farm dwelling on a 20.00-acre parcel in an EFU (Exclusive Farm Use) zone located in the 8000 block of Dennison Rd. SE, Sublimity. Applicants have not met the burden of proving the criteria to place a primary farm dwelling on the property on evidentiary grounds. The unharvested Christmas trees are a farm product, and the subject tract is employed for farm use. However, the evidence of sales in excess of $80,000 for the last two years submitted in support of the Application is not credible to support that commercially reasonable sales of farm products from the subject tract produced the threshold income requirement. The applicable criteria is not met, and the Administrative Review Application is DENIED.

## V. 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 Marion County Comprehensive Plan and zoned EFU (Exclusive Farm Use). The intent of both designation and zone is to promote and protect commercial agricultural operations. Dwellings in conjunction with farming may be approved subject to certain criteria.

2. The subject property is located on the east side of Dennison Rd, 0.3 miles north of its intersection with Coon Hollow Rd. The property is bare and is farmed in conjunction with the parcel directly south. The property is described by deed in its present configuration on June 5, 1974, and is therefore considered legal for land use purposes.

3. Surrounding uses are farm uses in all directions, with all adjacent parcels zoned EFU and planted with various farm crops. Some properties have dwellings, but many are large and vacant.

4. The Applicants are proposing place a primary farm dwelling on the subject property.

5. The Planning Division requested comments from various governmental agencies, and received the following responses:

   Public Works Land Development and Engineering Permits (LDEP) requested that the following be included in the land use decision.

   Requirements:

   A. *The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges*

*(SDCs) upon application for building permits per Marion County Ordinances.*

*B. Utility work in the public right-of-way requires PW Engineering permits.*

Marion County Building Inspection commented that building permits are required for new construction.

Friends of Marion County submitted comments requesting denial based on aerial photography research that shows the parcel has not been planted with Christmas trees long enough to produce the income needed to qualify for a dwelling. These can be viewed in full in the file.

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

6. Based on the Applicants' submission, the Planning Director for Marion County denied the Applicants' Application for Administrative Review. Applicants requested reconsideration on the basis of new information. The Planning Director for Marion County reconsidered and again denied the Application.

7. The Planning Director stated that in the request for reconsideration, the Applicants did not provide any new information. Staff states that on Reconsideration, Applicants argue that staff incorrectly determined that a crop must be harvested to constitute farm income. The narrative reads in part "There are essentially three parts to this portion of the definition: (l) current employment of the land; (2) for the purpose of obtaining a profit in money; and (3) by raising, harvesting and selling crops." Applicants argues that Staff understands that all these parts must occur each year but denies that the Code requires all three parts to occur each year.

8. Staff interprets the definition of "farm use" to require that the crop must be harvested to be considered a farm use that constitutes farm income. Staff states that with no trees harvested and no trees grown to maturity to be able to harvest, the income generated is not farm income. Staff also notes that many of the seedlings died in the summer of 2021 making it unlikely that the Applicants could raise $80,000 of farm income with the current acreage.

9. Applicants submitted documents documenting that approximately 9,300 trees were purchased from Drakes Crossing Nursery. Staff indicates that the dates of purchase, delivery and planting do not correspond with one another: The first invoice of the seedlings for planting from Drakes Crossing Nursery is dated March 16, 2021, with a ship date the previous November 30, 2020 (see invoice 13156); the corresponding contracting service for planting those trees is dated March 21, 2021. The sale invoice to Ron and Rhonda Perry is dated November 26, 2021, for 1,500 Noble Fir trees. Staff states that the trees appear to have been shipped before they were purchased. The second

submission of invoices from Drakes Crossing Nursery (invoices 13897 & 13939) is for a total of 6,300 trees (Noble Fir and Fraser Fir). This invoice is dated February 23, 2022, with a ship date of March 15, 2022, and the corresponding contracting service for planting those trees on February 27, 2022. The sale invoice to Ron & Rhonda Perry is dated January 03, 2022 for 1,500 Noble Fir trees. Staff posits that the trees appear to have been sold before they were purchased.

10. Without respect to the dates of the Barth's purchase of the trees, the Applicants submitted two invoices for the purchase of Christmas trees and deposit slips for the two payments described in the invoices. The dates on the invoices were 11/26/2021 and 1/3/2022. The amounts of the invoice were both $80,250 paid by Ron and Rhonda Perry to the Barth Brothers Tree Farm. Applicants state that there is no further financial obligation for the Perrys for the trees at the time of harvest.

11. Friends of Marion County (FOMC) concludes that it is highly unlikely that a Christmas tree stand of 2.37 acres can reach maturity in two years and yield $80,250 in sales. Applicants responds that Applicants have never argued that the trees would reach maturity in two years.

12. Applicants state that the Christmas trees that produced the farm income were sold in 2021 and 2022 because the sales occurred, the proceeds were collected, and the taxes were paid upon those proceeds. Applicants argue that the date of harvest or date that the buyer will take possession of the trees is without import.

13. Staff also indicated in its decision that the Oregon Department of Agriculture requires a license to sell more than $1,000 of Christmas and that staff was not able to find a license for the Applicants' sales of Christmas trees.

14. Staff denied the request for reconsideration, and Applicants timely appealed the denial of the reconsideration.

15. Austin Barnes, Marion County Planning Division, stated that two (2) acres of trees were planted at the time of Application, and the rest of the property was either logged or covered in grass and hay. On February 3, 2022, the Application was denied because the trees were planted the same year. Mr. Barnes stated that the Applicants did receive payments exceeding $80,000, but that no Christmas trees have been harvested. It is the position of Marion County Planning that the transaction constituted a future sale because no trees have been harvested, and that the transaction did not produce income as a farm use. In the Request for Reconsideration, the Applicants provided supplemental information regarding the invoices and indicated that harvest is not required for farm use. Mr. Barnes stated that the Applicants' interpretation of farm use is incorrect, and if there is no harvest, there cannot be farm income.

16. Fred Wilson, attorney for Applicants, submitted a supplemental hearing memorandum. Mr. Wilson indicated that Friends of Marion County argue that MCC 136.130(A)(1)(d) was not met, in addition to the direct challenge regarding whether MCC 136.130(A)(1)(b) is met. Mr. Wilson stated that the Applicants sold 1,500 trees each year, and that money was actually received for the sale of the trees and taxed. The trees will be received at a later date, but the sale was complete as income was received for trees that were sold. Mr. Wilson states that Marion County Planning believes that the definition for farm use requires that said crop must be harvested to gain income for farm use. However, accepted farm use principles evidence that many crops cannot be planted and harvested in the same year, and that even if the crops are not harvested, the crops may still be considered farm use. Mr. Wilson stated that the confusion arises with the definition of farm use and the farm income test and posits that Marion County Planning staff has confused the two concepts. Mr. Wilson stated that staff mistakenly understands that farm use requires a harvest. Mr. Wilson indicated that in a farm use, the primary purpose is to make income from the use of the property, and that the "letter of the law" has been met for the farm income test and farm use: over $80,000.00 was generated two years in a row from the sale of farm products and there is no requirement in the Code that the trees be harvested in the same year as the income is received. Mr. Wilson mentioned that Staff's concerns may arise from a concern that Christmas trees may not actually be grown, sold and delivered, or that the application is a sham. Mr. Wilson argued that the Barths are committed to a future of farming Christmas trees, and that being able to reside on the subject property will enhance their ability to farm for years to come.

17. Applicants Dustin and Kanoe Barth provided background on their rural upbringing and familiarity with farming. Mr. and Mrs. Barth addressed their opportunity to purchase land for the development of a Christmas tree farm in 2019, and development of Barth Brothers Farm LLC. Barth Brothers Farms, LLC planted its first trees in 2021, and now have 5,000 trees planted. The Barths have invested approximately $30,000 in farm equipment and supplies. The Barths have also paid in full for another lot of trees for delivery in 2023. The Barth testified regarding their desire to bring memories to families visiting Christmas tree farms and intend to develop the farm for years to come. The Barths testified that they appreciate the role of Friends of Marion County in safeguarding farmlands, but that their farm will contribute to the Marion County farm economy.

18. Wayne Howe testified in favor of Application. Mr. Howe testified that he has experience with the retail, sales, and purchase of trees since 1989. Mr. Howe testified that in his experience, he has purchased trees from the field so that he will have the trees available. Mr. Howe testified that he has purchased trees while they were young to have those trees in the future. Mr. Howe testified that he has purchased 20 acres with trees with seedlings or young trees, and that sometime a deposit is paid, and that sometimes the purchase is paid in full. Mr. Howe also stated that can be an industry practice to pay a deposit and manage trees until maturity to shape them. Mr. Howe also testified that he has sold trees to friends prior to harvest. These sales were complete at the time of the sale before harvest. Mr.

Howe stated that he has no knowledge of buyers in this case or in regard to their motives with the trees but does not note anything unusual with respect to the sale of trees or stock.

19. Guy Barth testified in favor of the Application. Mr. Barth testified that that he has been in the nursery business for over twenty-six years, and that farming is in their "blood." Mr. Garth testified that in his experience in the nursery business, he always sold in the future, which means he was paid in advance, and then harvested the next year. This was done because some varieties are more popular and there is a pre-harvest market. It was very common to sell forward because he would be asked to grow certain tree varieties. He stated that payment of futures became income at the time of the money transfer, and the income was the year before the harvest.

20. Roger Kaye, President of Friends of Marion County (FOMC), testified in opposition to the Application. Mr. Kaye testified that Friends of Marion County (FOMC) is an independent § 501(c)(3) organization dedicated to protection of farmland. Mr. Kaye testified that aerial photos from 2016, 2018, 2019, and 2021 show no sign of Christmas trees. Mr. Kaye stated that the Applicants claimed to have sold $80,000 and then $80,250 to the same buyers, which given the state of the farm and the maturity of the trees seems implausible. Mr. Kaye stated that the sales prices are not reflective of the value of the Christmas trees at the time of the sale, and that for a tree to be valued at $35-40 would require the trees to be in the ground for 5-7 years.

21. Dan Lawler, attorney for Friends of Marion County, argued in opposition to the Application. Mr. Lawler argued that the focus of the inquiry should be on the definition of the sale of farm product in MCC 17.136.030. Mr. Lawler argues on behalf of FOMC that there could not have been the sale of a farm product because the trees were not yet produced. The trees subject to the purported sale were not a "final product." Mr. Lawler argued that the Applicants sold the right to buy the Christmas trees upon maturity. Mr. Lawler also argued that with respect to real property law, trees are considered to be a part of the property until harvested. Upon the removal or harvest of the trees, the trees then become a farm product. Mr. Lawler stated that with regard to the sale of farm products, the product to be sold has not yet been produced and is years away from being finally produced, therefore it does not constitute a sale of farm products. For the full terms of the sale, there is no evidence, just an assertion that a sale was made. There is no evidence as to where the income comes from and which transaction it comes from. Since the trees are part of the land and the buyers do not own the land, it is not a sale. When asked whether it was the county's jurisdiction to decide what constitutes a sale, he responded that property law should be considered, under which it would not be considered a sale. Mr. Lawler stated that it cannot be proven that the buyers actually own the trees because they remain part of the real property.

22. Fred Wilson, Attorney for Applicants, provided rebuttal testimony and argued that non-land use statutes and property law are not applicable to the decision before the hearings officer. Mr. Wilson stated that Applicants have submitted receipts for both purchases and

testified that completed sales of the trees occurred. Mr. Wilson stated that the Barths will maintain management of the trees, and that if they sold the farm they would be responsible for delivery of the trees. Mr. Wilson acknowledges the County has a concern about sham applications, but because that the code definition of "farm use" does not require harvest.

23. Applicants submitted documents regarding the production of Christmas trees in the Pacific Northwest. Applicants submitted evidence that the median cost of a real Christmas tree in 2020 was $81, and that there are 200 fewer Christmas tree growers in the State of Oregon than there were fifteen years ago. The materials submitted by Applicants appear to support the position that because the Pacific Northwest's stock has been reduced by heat and draught, it is reasonable for a purchaser to obtain a supply of trees before maturity.

## VI. Additional Finding of Fact and Conclusions of Law

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

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

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 have not met their burden and the application must be denied. If the evidence for every criterion there's a hair or breath in applicant's favor the burden of proof is met, and the application is approved.

2. Dustin and Kanoe Barth signed the Administrative Review Application and are owners of the subject property as evidenced by the Statutory Warranty Deed recorded on October 16, 2019, at Reel 4255, Page 436.

State Law Analysis

3. ORS 215.283(1) provides for the uses that are permitted in an exclusive farm use zone. ORS 215.283(1)(e) provides that "Subject to ORS 215.279 (Farm income standard for dwelling in conjunction with farm use), primary or accessory dwellings and other buildings customarily provided in conjunction with farm use.

4. *ORS 215.279 provides:*

*In any rule adopted by the Land Conservation and Development Commission that establishes a farm income standard to determine whether a dwelling is customarily provided in conjunction with farm use on a tract the commission shall allow a farm operator to satisfy the income standard by earning the required amount or more of farm income on the tract:*

*(1) In at least three of the last five years;*
*(2) In each of the last two years; or*
*(3) Based on the average farm income earned on the tract in the best three of the last five years.*

*OAR 660-033-0135(4) provides:*

*On land identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:*

*(a) The subject tract is currently employed for the 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 or three of the last five years, or in an average of three of the last five years; and*

*(b) Except for seasonal farmworker housing approved prior to 2001, there is no other dwelling on lands designated for exclusive farm use pursuant to ORS chapter 215 or for mixed farm/forest use pursuant to OAR 660-006-0057 owned by the farm or ranch operator or the farm or ranch operation; and*

*(c) The dwelling will be occupied by a person or persons who produced the commodities that grossed the income in subsection (a) of this section;*

*(d) In determining the gross income required by subjection (a) of this section;*

*(A) The cost of purchased livestock shall be deducted from the total gross income attributed to farm or ranch income;*

*(B) Only gross income from land owned, not leased or rented shall be counted; and*

*(C) Gross farm income earned from a lot or parcel that has been used previously to qualify another lot or parcel for the construction of sitting of a primary farm dwelling*

Marion County Analysis

5. Marion County Code codifies state law with respect to dwelling established in the EFU zone at MCC 17.136.030.

6. The subject property is zoned EFU and consists of high-value farmland. Therefore, the application must satisfy the approval criteria of MCC 17.136.030(A)(1).

7. MCC 17.136.030(A)(1) provides:

*Primary Farm Dwellings. A single-family dwelling customarily provided in conjunction with farm use. The dwelling will be considered customarily provided in conjunction with farm use when:*

*1. It is located on high-value farmland as defined in MCC 17.136.140(D) and satisfies the following standards: if it meets the standards provided in MCC 17.136.030(A)(1). These standards include:*

*a. There is no dwelling on the subject farm operation on lands zoned EFU, SA or FT other than seasonal farm worker housing. The term "farm operation" means all lots or parcels of land in the same ownership that are used by the farm operator for farm use;*

*b. The farm operator earned on the subject tract in the last two years, three of the last five years, or the average of the best three of the last five years at least $80,000 in gross annual income from the sale of farm products. In determining gross annual income from the sale of farm products, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract. Only gross income from land owned, not leased or rented, shall be counted;*

*c. The subject tract is currently employed for the farm use that produced the income required in subsection (A)(1)(b) of this section;*

*d. The proposed dwelling will be occupied by a person or persons who produced the commodities which generated the income in subsection (A)(1)(b) of this section.*

8. There is no dispute that the property is zoned EFU and that the property consists of high-value farmland as defined in MCC 16.136140(D). The Application must satisfy the four criteria stated in MCC 17.136.0330(1)(a)-(d).

*a. There is no dwelling on the subject farm operation on lands zoned EFU, SA or FT other than seasonal farm worker housing. The term "farm operation" means all*

*lots or parcels of land in the same ownership that are used by the farm operator for farm use;*

There is no existing dwelling on the subject parcel and the Applicants do not own any additional farmland. The standard in MCC 17.136.030(A)(1)(a) is met.

b. *The farm operator earned on the subject tract in the last two years, three of the last five years, or the average of the best three of the last five years at least $80,000 in gross annual income from the sale of farm products. In determining gross annual income from the sale of farm products, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract. Only gross income from land owned, not leased or rented, shall be counted;*

MCC 17.136.030(A)(1)(b) is known as the "farm income test" and is the crux of this case. Applicants argue that completed sales of Christmas trees have occurred because Applicants received in excess of $80,000 in the last two years for the Christmas trees of the subject tract. The Christmas trees have not yet reached maturity and have not been harvested. Applicants argue that the completed payment for the trees and the right to acquire the trees without further payment evidences a sale of farm products.

Friends of Marion County (FOMC) argues that Applicants do not satisfy the farm income test because it is unlikely that the farm was able to produce the reported sales and because the operation does not meet the "farm use" test. FOMC argues that Applicants do not satisfy 17.136.030(A)(1)(b) because the provision requires the Applicants to provide proof of "at least $80,000 in gross annual income from the *sale of farm products.*" FOMC argues that the Applicants "ha[ven't] completed any sales of farm products." FOMC states that the Applicants' purported sale of trees is simply a "contract for future sale" or "a right to buy farm products at some point in the future." FOMC states that the transactions with purported buyers Ron and Rhonda Perry are "not the same as a sale" and that the "actual sale will occur when the buyer receives the product. FOMC argues that Applicants fail to demonstrate that any of the income it references comes from the "sale of farm products" because the income actually came from a right to buy farm products in the future.

Staff stated that because no Christmas trees had been harvested from the subject property, the income was based on the future right to buy the Christmas trees. Staff posits that the future sale of a Christmas tree is not a farm product or a farm use and does not constitute the sale of a farm crop, as no crop changed hands. In short, Staff denied the Applicant's use of the property is "farm use" because the crop has not been harvested.

Analysis of Farm Income Test

The definition of "farm use" is stated in MCC 17.110.223 which mirrors ORS 215.203(2):

*"Farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic bird and animal species that are under the jurisdiction of the commission to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this section. "Farm use" does not include the use of land subject to the provisions of ORS Chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3) or land described in ORS 321.267(3) or 321.824(3).* (Emphases added.)

In *Cox v. Polk County,* LUBA No. 2000-030, Page 7 (Or. LUBA 2000), the opinion states:

> "The ORS 215.203(2) definition of 'farm use' is lengthy, and awkwardly constructed. The statute has been amended a number of times over the years, and making sense out of the definition of 'farm use' in ORS 215.203(2), viewed as a whole, is not easy. ORS 215.203(2)(a) is composed of six sentences. The first five sentences set out what 'farm use' 'means' or 'includes,' and the last sentence identifies certain forest lands that 'farm use' 'does not include.' Two of the first five sentences in ORS 215.203(2)(a) specifically require 'current employment of land for the primary purpose of obtaining a profit in money by' one or more of the activities listed in the statute. ORS 215.203(2)(b) then provides an 11-part description of what "[c]urrent employment" of land for farm use includes."

OAR 660-33-1035(9) considers whether a dwelling may be considered customarily provided conjunction with farm use. OAR 660-33-1035(9)(b)(A) requires that the lot on which the dwelling will be located is currently employed for the farm use as defined in ORS 215.203, that produced farm income required by OAR 660-033-0135(3) or (4).

ORS 213.203 provides, in relevant part, that farm use is defined as "employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling

crops." The language "currently employed for the farm use" does not limit that the use can be farm use prior to the actual receipt of income.

Both the farm use definition in ORS 215.203(2)(a) and the OARs implementing Goal 3 (Agricultural Lands) distinguish between different types of farm use. The first sentence of ORS 215.203(2)(a) lists several distinct categories of farm use: (1) raising, harvesting and selling crops, (2) the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees, or for dairying and the sale of dairy products, (3) any other agricultural or horticultural use or animal husbandry or any combination thereof. The subsequent sentences set out additional categories of activities that qualify as "farm use." *See, e.g., Chapman v. Marion County* (Or. LUBA 2010).

The broad categories of activities that qualify as "farm use" tend to imply that a strict reading of the language, such that it requires "raising, harvesting, and selling" of crops to be completed before being considered farm use, is not reasonable.

ORS 215.203(2)(b)(C) provides that "current employment of land for farm use" includes "Land planted in orchards or other perennials...prior to maturity." ORS 215.203(b) also defines current employment of land for farm use to include land lying fallow for agricultural husbandry (Subsection B); EFU wasteland that is neither economically tillable nor grazeable (Subsection E); any land constituting a woodlot not to exceed 20 acres, contiguous to and owned by the owner of land specially valued for farm lot even if the land constituting the woodlot is not utilized in conjunction with farm use (Subsection H); land lying idle where the absence of farming activity is due to the farmer's illness (Subsection I); and land used for the processing of farm crops into biofuel (Subsection K).

The Oregon Tax Court has also examined the definition of "farm use" under ORS 215.203(2) for purposes of special assessments:

In *Linfoot v. Department of Revenue*, 4 OTR 489 (1971), the court determined that farm use required current employment of land for the purpose of obtaining a profit in money thought certain acts. In the present Application, Applicants have obtained a profit as evidenced by the invoice for payment, payment, deposit, and taxing of the payment. The planting of additional seedlings supports the continued intention to obtain a profit from the use of the property.

In *Ritch v. Department of Revenue*, 4 OTR 206, 210-211 (1970), the court stated that "In order for an owner to qualify for assessment for farm use it is reasonable to conclude that the owner must ultimately receive compensation, in some form, from farming or grazing operations." In the present Application, the Applicants have received compensation, regardless of the characterization of the sale. The Applicants acknowledge an obligation to harvest the Christmas trees upon the request of the buyer.

Farm use means the employment of land for the purpose of obtaining a profit in money. Staff indicates that in its review of MCC 17.136.030(A)(1)(C) that the property is employed for farm use. The property is currently employed for the farm use.

Upon a determination that the property is in farm use, the inquiry becomes whether Applicants earned income from the sale of farm product; that is, whether an immature and unharvested Christmas tree is considered a "farm product."

"Farm Product" is defined in ORS 80.100(6) as an agricultural commodity including but not limited to wheat, corn, soybeans, or a species of fish or livestock such as cattle, hogs, sheep, horses or poultry used or produced in farming operations, or a product of such crop, fish or livestock in its unmanufactured state, including but not limited to wool clip, milk, and eggs, that is in the possession of a person engaged in farming operations.

Oregon is a top producer of Christmas trees, and it is undisputed that Christmas trees are an agricultural commodity now grown primarily on farms.

Staff and FOMC argue that the income received by the Applicants was for the right to buy a farm product in the future, and not income earned from the actual sale of a farm product. However, Applicants produce invoices, proof of payment, and testify as to an obligation to harvest and provide the Christmas trees on the subject tract to the buyer.

ORS 214.297(1)(a), although specific to the section, defines farm income as "taxable income attributable to a farming business.

Friends of Marion County challenges that the subject tract is employed for farm use based on the tense of the verb "produced." FOMC argues that the Applicants are still growing the trees and have not "produced" any farm products, Applicants cannot have "produced" income.

Friends of Marion County's reading of the code is unreasonably narrow. Many crops are sold before harvest on fully executed contracts, including hops and corn. If the Christmas trees had reached maturity and a sale agreement was entered with the exchange of money, but the trees had not yet been harvested, it seems unlikely that a challenge would be made regarding whether Applicants had received income for the farm product.

The current employment of land for the purpose of obtaining a profit in money does not require that the farm product be harvested the same year—only that there is a purpose to obtain a profit in money, which cannot be done without a harvest. Again, Applicants testified as to an intent to harvest the Christmas trees for the buyer in exchange for the funds received. Applicants have received payment in advance of harvest, but nevertheless, the Applicants received payment for the product on the subject tract.

In *1000 Friends v. Benton County*, 32 Or. App. 413, 575 P.2d 651, Rev. den. 284 Or. 41, 584 P.2d 1371 (1978), gross income includes money receipts from the sale of agricultural products without regard to the costs that may have been incurred. The court writes "The legislative history of ORS 215.203 indicates that the use of the term 'profit' in that statute does not mean profit in the ordinary sense, but rather refers to gross income..." *Id.* at 428.

There is no language in the Code that requires a Christmas tree to be harvested prior to producing income. Although crops must be raised and harvested to be sold, there is no requirement in the Code that the harvest occur before the sale of the crop. A sale with payment in advance of delivery is still a sale, and the Applicant did receive income for sale of a farm product on the subject property, even though significant costs will still be required to culture, spray, and harvest the trees.

The Applicants' property is in farm use, and Applicants earned income from the sale of a farm product that has not yet been harvested. To satisfy the criterion of MCC 17.136.030(A)(1)(b), the "farm income test," the Applicant must establish that the Applicant received in excess of $80,000 in the last two years for the Christmas trees of the subject tract.

The legitimacy of the sale transactions are at issue. The concerns raised in opposition to the Application by Friends of Marion County and the support for Staff's denial seems to lie in the understandable concern about a manipulation of the Code and the legitimacy of the sale of the trees. Staff accurately notes that the acreage planted could not reasonably generate in excess of $80,000 at market rate or large enough to support to back-to-back years. The price per tree is inflated from the market price. Staff raises the concern that these facts appear that Applicants seek to manipulate the free market to gain a home site.

Staff candidly admits that the legitimacy of the sale based on the inflated market rate of the farm product is "not in our Code..." But, the inflated market rate, the lack of documentation for the sale transaction, the state of the trees at the time of the purported sale, and the significant financial requirements to the Applicants prior to and at the time of harvest undermine the credibility of the sale.

The testimony of Dustin and Kanoe Barth evidences, 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. The Barths' appear to have a genuine and heartfelt desire to have a Christmas tree farm for families to enjoy and make memories. The Barth's good intentions are doubted or questioned by the Hearings Officer.

Staff's decision faults the Barths for not harvesting the Christmas trees when the sales were made. However, Applicants, in relying on the language of the text, deny that a farm use requires the crops be harvested the same year as the sale. At some point, the crops will have to be harvested, and a sale for a crop contemplates that harvest must occur. The hearings officer agrees with the Applicants' understanding of the Code that the harvest of

the farm product does not need to occur in the same year. However, whether the Christmas trees have been harvested or not, the sale transactions proffered to satisfy the Code's criteria must be credible.

The farm income test requires, in relevant part, that operator earned at least $80,000 in the last two years from the sale of farm products on the subject tract. Although the operator provided invoices and proof of payment exceeding $80,000 for the last two years, 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.

Applicants did not submit any contracts for the sale of the Christmas trees. The purported sale is documented by invoices and cancelled checks for payment. The invoices submitted by Applicant (Exhibit 9 and Exhibit 10) refer to a quantity of Nobel trees subject to the sale, and a ship date that is the same date as the invoice. There 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. There is no connection between the subject tract and the trees referenced in the invoices. There are no documents to establish that in excess of $80,000 in income was produced by the Christmas trees on the subject tract. The Applicants could provide the contracted number of trees from any location and satisfy its obligation with respect to the sale. The evidence presented including the invoices and the cancelled checks suggest that the reported gross income was not from the production of the 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.

Christmas trees are an unusual crop because of the extremely long production cycle. One tree takes eight-to-ten years to mature to six feet. It is not unheard of for entire crops of trees to be lost as a result of draught or frost. The price per tree as reflected in the invoices is significantly inflated from the market price. Applicants provide evidence to support an inflated market price is reasonable for the trees based upon the potential short supply at the time of harvest. Further, Applicants are under no requirement to enter a private transaction for a sale at fair market value. However, the price per tree does not appear to be commercially reasonable for trees that are essentially seedlings (with disputed evidence that the trees are even viable) and up to a decade prior to harvest.

If the subject tract was sold by the Applicants, the sale agreement for the trees could be unenforceable. Whether growing crops are considered personal property or real property depends on the relationship between the parties. *Falk v. Amsberry*, 53 Or. App. 735, 739, 633 P.2d 799 (1981). As between a landlord and a tenant, crops planted during the tenancy are the personal property of the tenant, absent some agreement to the contrary. *Id.* at 740, 633 P.2d 799. As between the vendor and vendee of land, however, conveyance of the land

also conveys the growing crop as part of the real property, unless the deed reserves ownership to the vendor. *Id.* at 739, 633 P.2d 799 (citing *Tallman v. Havill*, 133 Or. 407, 291 P. 387 (1930). If real property is sold, the growing crop would transfer to the buyer. *Taggart v. Battaglia*, 915 P.2d 1001, 140 Or. App. 585 (Or. App. 1996). If the subject property was sold, barring some deed of ownership with respect to the trees, the buyer of the subject property would be the owner of the Christmas trees. Applicants did not provide any document or evidence to support that the purported purchasers, the Perrys, had any ownership interest in the growing crop.

The evidence supporting the application must be such that a reasonable person could only conclude that the applicable criteria are satisfied. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to on recons* 151 Or App 16, 949 P2d 1125 (1997).

A reasonable person could not conclude that these transactions were credible sales of Christmas trees sufficient to establish that Applicants, as farm operators, earned in the last two years at least $80,000 in gross annual income from the sales of farm products on the subject tract.

c. *The subject tract is currently employed for the farm use that produced the income required in subsection (A)(1)(b) of this section;*

Friends of Marion County argue that the Applicants have not satisfied this criterion because the provision requires the subject tract to be "employed for the farm use that *produced* the required income." FOMC argue that subsection (c) uses the term "produced" rather than "produces" or "will produce," and the Code's use of past tense requires income to have been produced. Because FOMC argues that the Applicants are still growing the trees and has not "produced" any farm products, the subject tract cannot have "produced" income.

However, the subject tract is employed for farm use as it is employed for the purpose of obtaining a profit in money by the raising, harvesting (eventual harvesting), and sale of crops. The subject tract is employed to raise, harvest, and sell Christmas trees. The invoices evidence that Christmas trees have been sold from the lot even if they have not yet been harvested. The Applicants state that the trees will be harvested. To the extent that income was produced, it was produced from the employment of the property for farm use. The standard in MCC 17.136.030(A)(1)(c) is met.

d. *The proposed dwelling will be occupied by a person or persons who produced the commodities which generated the income in subsection (A)(1)(b) of this section.*

Friends of Marion County argue that the Applicants have not satisfied this criterion because the provision requires the proposed dwelling to be occupied by "a person or persons who *produced* the commodities which generated the income." FOMC argue that subsection (d) uses the term "produced" rather than "produces" or "will produce," and the code's use

of past tense requires the income test to be based on farm products that have already been "produced." FOMC argues that the Applicants are still growing the trees and have not "produced" any farm products yet.

Applicants argue that the provision is directed at insuring that the person or persons who live in the farm dwelling are the actual farm operators, not someone who is taking advantage of someone else's farming.

The dwelling is proposed to be lived in by Dustin Barth, owner of Barth Brothers Tree Farm, with his wife, Kanoe Barth. Staff agrees that the Applicants satisfy the provision. To the extent income was generated by the production of commodities, it was generated by the Barths. The standard in MCC 17.136.030(A)(1)(d) could be met if the Applicants could credibly establish the threshold income requirement.

## VII. Order

It is hereby found that Applicants have not met the burden of proving the applicable standards and criteria for approval of the Administrative Review Application to place a primary farm dwelling on a 20.00 acre parcel in an EFU (Exclusive Farm Use) zone located in the 8000 block of Dennison Rd SE, Sublimity (T8S; R1E; Section 31; tax lot 100) on evidentiary ground. The Administrative Review Application is DENIED.

## VIII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this Order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Suite 2130, Salem, Oregon by 5:00 p.m. on the 23 day of July, 2022 (15 days after the date of the Order). 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 returned.

DATED at Salem, Oregon this 8 day of July, 2022.

Jill F. Foster

Jill F. Foster
Marion County Hearings Officer

## CERTIFICATE OF MAILING

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

Norm Bickell
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Salem, OR 97317

Dustin & Kanoe Barth
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Sublimity, OR 97385

Dixie Barth
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Sublimity, OR 97385

Guy Barth
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Sublimity, OR 97385

Wayne Howe
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Agencies Notified:

Area Advisory Committee 2
*(Via email: denk@wvi.com)*

Friends of Marion County
*(Via email: rkaye2@gmail.com)*
1000 Friends of Oregon
*(Via email: permits@friends.org)*

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By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 8 day of July, 2022 and that the postage thereon was prepaid.

Ally Dyer-Ybarrondo
Administrative Assistant to the
Hearings Officer