



MARION COUNTY BOARD OF COMMISSIONERS


**Board Session Agenda Review Form**

Meeting date: June 10, 2020

Department: Public Works      Agenda Planning Date: June 4, 2020      Time required: None

☐ Audio/Visual aids

Contact: Joe Fennimore      Phone: 503-566-4177

Department Head Signature:  


**TITLE**

Receive hearings officer's decision approving Administrative Review (AR) Case 20-005/Arnold & Hupp.

**Issue, Description & Background**

The Marion County Hearings Officer conducted a public hearing on May 13, 2020, and the record was left open for written testimony until May 20, 2020. On June 2, 2020, the hearings officer issued a decision approving the case. As part of the land use process, the board must officially receive the hearings officer's decision.

**Financial Impacts:**

None.

**Impacts to Department & External Agencies**

None.

**Options for Consideration:**

1. Receive notice of the decision.
2. Receive notice of the decision and call the matter up.

**Recommendation:**

Staff recommends the board of commissioners receive notice of the decision.

**List of attachments:**

Hearings officer's decision

**Presenter:**

Joe Fennimore

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

**Copies to:**

Joe Fennimore - gfennimore@co.marion.or.us

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of:	)	Case No. AR 20-005
	)	
Nicholas Arnold and Kelsey Hupp	)	<b>Administrative Review</b>

**ORDER**

**I. Nature of the Application**

This matter came before the Marion County hearings officer on appeal by Melodie Osteen of the Planning Director's approval of the application of Nicholas Arnold and Kelsey Hupp for an administrative review to place a primary farm dwelling on a 12.71<sup>1</sup> acre parcel in an EFU (Exclusive Farm Use) zone located at 5150 Forest Ridge Road NE, Silverton (T6S; R1E; Section 31D; tax lot 400).

**II. Relevant Criteria**

The standards and criteria relevant to this application are found in the Marion County Code (MCC), title 17, especially chapter 17.136, and the Marion County Comprehensive Plan (MCCP).

**III. Hearing**

A public hearing was held on this appeal on May 13, 2020. At hearing, the Planning Division file was made part of the record. The following persons appeared in person and provided testimony:

- |    |                 |                   |
|----|-----------------|-------------------|
| 1. | Lisa Milliman   | Planning Division |
| 2. | Nicholas Arnold | Applicant         |

Because of social distancing restrictions in place due to COVID-19, the following person appeared by telephone and provided testimony:

- |    |                |           |
|----|----------------|-----------|
| 1. | Melodie Osteen | Appellant |
|----|----------------|-----------|

The following documents were entered into the record as exhibits at hearing:

- |       |  |
|-------|--|
| Ex. 1 | Document packet from Nicholas Arnold, containing the following: a copy of the application narrative; an explanation of on-site Christmas tree production; a copy of MCC 17.136.030; Marion County Assessor's property records for the Subject Property; a photograph of trees planted on the property; an aerial photo showing slope on the Subject Property; aerial photos of the property from July 23, 2016 and July 8, 2010; copies of invoices and check stubs for Christmas tree sales from 2018 and 2019; a letter from Jon Haynes, CPA; and Kelsey Hupp's 2018 IRS Schedule F. |
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<sup>1</sup> It was clarified at hearing that the parcel is 12.71 acres, not 21.71, as stated in the notice and the Planning Director's decision.

The following documents were entered into the record as exhibits during the open record period:

- Ex. 2            Kelsey Hupp's 2019 IRS Schedule F.
- Ex. 3            Four photographs of harvest on the Subject Property, with a note from Applicants stating that they utilize outside labor to help with some of the larger jobs on the farm such as harvest and other tasks where timing is critical.

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at the hearing. The record remained open until May 20, 2020 for participants to submit additional written testimony, argument, and evidence and until May 27, 2020 for Applicants' final rebuttal.

At hearing, the hearings officer did not swear in Mr. Arnold or Ms. Osteen before they testified. Mr. Arnold and Ms. Osteen signed Oaths or Affirmations after the hearing closed but while the record remained open. The Oaths or Affirmations are included in the record.

#### **IV. Executive Summary**

Applicants request an administrative review approval to place a primary farm dwelling on a 12.71 acre parcel in an EFU zone located at 5150 Forest Ridge Road NE, Silverton (T6S; R1E; Section 31D; tax lot 400). Applicants have met the burden of proving that criteria for placing the primary farm dwelling in conjunction with farm use have been met. The administrative review application is **APPROVED**, with conditions.

#### **V. Findings of Fact**

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

1. The Subject Property is located on the north side of Forest Ridge Rd NE, approximately 2,000 feet southeast of its intersection with Evans Valley Loop NE. The property was described by deed on January 1, 1974 (Reel 866, Page 173) and is, therefore, considered a legal parcel for land use purposes.
2. The Subject Property is designated Exclusive Forest Use 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.
3. Surrounding properties in all directions are in various farm and residential uses and are all zoned EFU.
4. Applicants are proposing to locate a primary farm dwelling to be occupied by the farm operators in a central location on the parcel.
5. The Soil Survey of Marion County, Oregon indicates 73.6% of the Subject Property is high-value farm soils.

6. Applicant Nicholas Arnold testified at hearing that all the income used to meet the \$80,000 gross income threshold under MCC 17.136.030 for 2018 and 2019 came from Christmas trees grown and harvested on the Subject Property. Mr. Arnold testified that the trees were already planted on the Subject Property when Applicants bought the property and were purchased by Applicants as part of the sale. Mr. Arnold testified that he and Ms. Hupp cultivated and harvested the trees that were sold in 2018 and 2019.
7. Applicant testified that they use a high-density production strategy to grow smaller, table top trees for a niche market. The trees are generally planted 3 feet apart, yielding 4,840 trees per planted acre. Applicant explained that this strategy is what allowed Applicants to achieve the incomes reported and needed to allow a primary farm dwelling on the Subject Property. These “elf” or table top trees are typically harvested when they are between 30-36 inches tall and are generally marketed to big box stores. It takes approximately three to four years for these trees to grow to harvest size.
8. Applicant included a topographic map in Exhibit 1, which he stated shows a water trap at the bottom of the hill on the Subject Property. Applicant testified that the map also shows that the slope for the majority of the parcel slopes away from the road, and that in the areas where it does not, water is stopped by the water trap.
9. Applicant testified that the building currently on the property is used for farm storage. The building has a well and garbage service, used in conjunction with the farm use, but it has no septic system.
10. Addressing a concern submitted by Darren and Laura Melton via email, regarding dust abatement on Forest Ridge Road NE, Applicant testified that he agreed to divide the costs associated with dust abatement with the Meltons for the portion of the road running between their two properties.
11. Appellant Melodie Osteen expressed concerns in her testimony about the property being subdivided and turned into rental properties. She also expressed traffic concerns, noting that the road, often dubbed by neighbors at this location as “Snake Hill,” is not well maintained. Appellant stated she does not believe it is possible for Applicants to have earned over \$80,000 in gross income on the Subject Property in 2018 and 2019. She also expressed concern regarding water availability and stated that adding more houses will affect the water table. She expressed concern over semi-trucks using the road, particularly due to the limited turnaround. She clarified that her concern is with increased truck traffic related to the farm operation, not building a residence on the property.
12. Applicant responded that they have no intention to subdivide the property or create rental properties on it. He stated that this is a small family operation on small acreage, and there is no necessity for labor housing. Applicant stated that their intention is to build a home for their family and be able to better care for their Christmas tree farm, as well as minimize the number of trips from town. He commented that this is an EFU zone and that farming Christmas trees is permitted,

along with associated vehicle use. He reiterated that the trees are planted at a higher density and are harvested at a smaller size than traditional Christmas trees. He stated that regardless of whether a house is built on the property, there are commercial farming operations on the property and in the surrounding area that use heavy farm equipment that will drive on Forest Ridge Road NE.

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

- A. In accordance with Marion County Code (MCC) 11.10, driveways must meet MCPW design standards. The following numbered sub-requirements pertain to access:
  - 1. At the time of application for building permits, an Access Permit will be required for the dwelling.
  - 2. Access Permit #17-005731 for the AGEX Shop, located mid-way along the property frontage, had had final inspection conducted. The Permit did not require a culvert be installed at the time.
  - 3. Since the time the shop access had been completed, Marion County Road Operations Division identified a storm water runoff issue on the road that was resulting in wash boarding of the gravel surface. In response, they have reportedly installed a ditch west of the shop access.
  - 4. In order to minimize Forest Ridge Road runoff it is required of the Applicant to install driveway culverts day lighted in at the proposed access and at the shop access, as well. We appreciate your understanding in conducting the required retroactive, remedial culvert work at the shop access, which will lessen the frequency for road regrading.
  - 5. A rudimentary field access located just west of the eastern roadway curve is not an authorized access. Use of that access must be discontinued due to lack of safe vision distance along the roadway curve and inevitable dragging of soils onto the roadway. Access should be taken from the shop access or from the proposed residential access to be installed.
- B. 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 Ordinance #00-10R and #98-40R, respectively.
- C. Utility work in the public right-of-way requires separate PW Engineering permits.

Applicant stated no objections to the requirements imposed by Public Works.

Marion County Building Inspection commented that a building permit would be required for new construction or placement of a manufactured home. All other contacted agencies either failed to respond or stated no objection to the proposal.

1000 Friends of Oregon provided comments regarding the source of income and the applicants' ability to meet the required criteria.

Darren and Laura Melton provided comments via email regarding the source of income, road maintenance, and re-zoning.

## **VI. Additional Findings of Fact and Conclusions of Law**

1. Applicants have the burden of proving all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

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

Applicants must prove, by substantial evidence in the whole record, that it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, Applicants have not met their burden and the application must be denied. If the evidence for every criterion is in Applicants' favor, then the burden of proof is met and the application must be approved.

2. Applicants seek administrative review approval for a primary farm dwelling in conjunction with farm use in an EFU zone.
3. Under MCC 17.110.680, the Planning Director determines whether dwellings subject to standards are permitted in the applicable zone following MCC 17.115 procedures. The Planning Director had authority to make the subject determination.
4. Under MCC 115.110(C), the applicant or any person aggrieved or affected by the decision may file a request for a hearing to the planning division within 15 days of the date the decision was rendered. Under MCC 115.110(F), on request for a hearing, the hearings officer shall hold a hearing on the matter in accordance with Chapter 17.111 MCC. The hearings officer may hear and decide this matter.
5. Under MCC 17.115.110, administrative reviews are subject to MCC 17.119.020 and .025 conditional use application requirements.
6. Under MCC 17.119.020, property owners may file an application. Under MCC 17.119.025, property owners may sign an application. An August 30, 2017 bargain and sale deed recorded at reel 3987, page 109 shows that the Subject Property was transferred to Nicholas Arnold and Kelsey Hupp. Applicants own the Subject Property and could sign and file the application. MCC 17.119.020 and 17.119.025 are satisfied.

7. Under MCC 17.115.110(A), an administrative review decision shall be made on the basis of the comprehensive plan and applicable standards and criteria in MCC title 17.
8. Under MCC 17.136.030, the following dwellings may be established in the EFU zone with filing of the declaratory statement in MCC 17.136.100(C), subject to approval by the director, based on satisfaction of the standards and criteria listed for each type of dwelling pursuant to the procedures in Chapter 17.115 MCC:
  - A. 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:
      - 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, not including marijuana. 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[.]
9. High value farmland. MCC 17.136.140(D) defines high-value farmland as a tract composed predominantly of:
  1. Soils rated Class I or II, prime, or unique, either irrigated or not irrigated;
  2. The following Class III soils: Chehalem (CeC), Concord (Co), Hullt (HuD), Jory (JoD), Nekia (NeC, NeD, NkC), Salkum (SkD), Silverton (SuD), and Woodburn (WuD);
  3. The following Class IV soils: Bashaw (Ba), Camas (Ca), Courtney (Cu), Dayton (Da), and Jory (JoE).

MCC 17.136.140(F) defines tract as one or more contiguous lots or parcels under the same ownership. Applicants own no contiguous property. The soil on the Subject Property is composed of Nekia soil (NeB, NeC, and NeE). It is predominantly NeC, which is listed as high value soil in MCC 17.136.140(D)(2). The property is evaluated under MCC 17.136.030(A)(1).

10. No dwelling. The zoning map in the record shows the Subject Property is in an EFU resource zone. Aerial photographs and an assessor's office printout show the Subject Property contains no dwelling. MCC 17.136.030(A)(1)(a) also requires Applicants to prove whether the farm operation includes other properties, and whether those properties contain dwellings other than farmworker housing. Applicants stated in their application that there are no dwellings on the subject farm operation owned by Applicants. There are no other EFU, SA, or FT zoned properties listed in the assessor's records under Applicants' names. This portion of MCC 17.136.030(A)(1)(a) is satisfied.
11. Farm use. MCC 17.136.030(A)(1)(a) also requires Applicants to prove a farm operation on the Subject Property, including identifying the farm use and the farm operator. ORS 215.203(2)(a) defines farm use as:

"[T]he 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, fur-bearing 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 State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. "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 or land described in ORS 321.267 (3) or 321.824 (3)."

Under ORS 215.203(2)(d), "cultured Christmas trees" means trees:

- "(A) Grown on lands used exclusively for that purpose, capable of preparation by intensive cultivation methods such as plowing or turning over the soil;
- (B) Of a marketable species;

- (C) Managed to meet U.S. No. 2 or better standards for Christmas trees as specified by the Agriculture Marketing Services of the United States Department of Agriculture; and
- (D) Evidencing periodic maintenance practices of shearing for Douglas fir and pine species, weed and brush control and one or more of the following practices: Basal pruning, fertilizing, insect and disease control, stump culture, soil cultivation or irrigation.”

Evidence in the record shows the Christmas trees on the Subject Property are grown on lands used exclusively for that purpose, as there is no other use on the property. Applicants stated that the trees are of a marketable species, as also shown by 2018 and 2019 sales receipts. Applicants stated that the trees are sheared, basal pruned, and that weed control and abatement strategies are employed to increase vigor and overall plant health. The farm use definition also states that land must be employed for the primary purpose of obtaining a profit in money. In cases like this, Applicants often submit income tax schedules 1040 F (farm profit or loss). Applicants submitted such schedules into the record, showing that gross profit from the farm operation totaled \$81,664.00 and \$85,139.00 for 2018 and 2019, respectively. The Subject Property is used for farm use. This portion of MCC 17.136.030(A)(1)(a) is satisfied.

12. Farm operator. MCC 17.136.030(C)(2) offers a farm operator definition in a secondary farm dwelling context, which is useful here:

“A farm operator is a person who operates a farm, doing the work and making the day-to-day decisions about such things as planting, harvesting, feeding, and marketing.”

Applicant Nicholas Arnold testified that he and Applicant Kelsey Hupp cultivated and harvested the trees that were sold from the Subject Property in 2018 and 2019. He explained the high-density production strategy they utilize, which allows them to grow smaller, table top trees for a niche market. Applicants are the farm operators. This portion of MCC 17.136.030(A)(1)(a) is satisfied, and **MCC 17.136.030(A)(1)(a) is satisfied in full.**

13. Farm operator earned income. MCC 17.136.030(A)(1)(b) requires that:

“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, not including marijuana. 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[.]”

Applicants stated that they are fully responsible for management of their crop, and the Subject Property is not leased or managed by anyone else. Applicants submitted income tax schedule 1040 Fs (farm profit or loss) (“Schedule F”) for the Subject Property for 2018 and 2019. The 2018 Schedule F showed gross income of \$81,664.00

and the 2019 Schedule F showed gross income of \$85,139.00. Applicants also included invoices and check stubs for the sales of Christmas trees from the property during these two years. Applicant explained at hearing that they use a high-density production strategy. The trees on the Subject Property are planted at a higher density, generally spaced 3 feet apart, yielding 4,840 trees per planted acre. Applicant explained that this strategy is what allowed Applicants to achieve the incomes reported and needed to allow a primary farm dwelling on the Subject Property.

Although Appellant expressed doubt regarding Applicants' ability to earn over \$80,000 in gross income for the past two years, Applicants have shown by a preponderance of evidence that they have done so, and the record contains no evidence to the contrary. **MCC 17.136.030(A)(1)(b) is satisfied.**

14. Currently employed for the farm use. MCC 17.136.030(A)(1)(c) requires the subject tract be currently employed for the farm use that produced the income required in subsection (A)(1)(b). As stated above, the Subject Property is currently employed for Christmas tree production. The record also contains photographs of the Subject Property currently planted with Christmas trees. **MCC 17.136.030(A)(1)(c) is satisfied.**
15. Occupied by a person(s) who produced the commodities. 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. As established above, Applicants are the persons who produced the commodities which generated the income in subsection (A)(1)(b). Applicants plan to build a dwelling on the Subject Property for their family, in order to be able to better care for their Christmas tree farm. **MCC 17.136.030(A)(1)(d) is satisfied.**

## VII. Order

It is hereby found that Applicants have met their burden of proving the applicable standards and criteria for approval of an administrative review application for primary farm dwelling in conjunction with farm use have been met. Therefore, the administrative review application is APPROVED, with the following conditions:

1. Applicants shall obtain all permits, including subsurface sewage disposal, required by the Marion County Building Inspection Division.
2. Prior to the final occupancy, Applicants must provide evidence, to the satisfaction of the Planning Director, that the dwelling is, or will be, occupied by the owner or an employee of the current farm operation.
3. Applicants shall install driveway culverts day lighted in at the proposed access and at the shop access.
4. A rudimentary field access located just west of the eastern roadway curve must be discontinued. Access must be taken from the shop access or from the proposed residential access to be installed.

### 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 (1115 Commercial Street NE, Salem) by 5:00 p.m. on the 17th day of June 2020. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 2<sup>nd</sup> day of June, 2020.

A handwritten signature in black ink, appearing to read 'Stephanie L. Schuyler', written over a horizontal line.

Stephanie L. Schuyler  
Marion County Hearings Officer

## CERTIFICATE OF MAILING

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

Nicholas Arnold and  
Kelsey Hupp  
219 Ames Ct.  
Silverton, OR 97381

Melodie Osteen  
4945 Forest Ridge Rd. NE  
Silverton, OR 97381

Darren and Laura Melton  
5135 Forest Ridge Road NE  
Silverton, OR 97381

Roger Kaye  
Friends of Marion County  
10095 Parrish Gap Road SE  
Turner, OR 97362

Dawn Olson (AAC Member #7)  
15056 Quall Road  
Silverton, OR 97381

James Sinn (AAC Member #7)  
3168 Cascade Hwy NE  
Silverton, OR 97381

### Agencies Notified:

#### Planning Division

(via email: [gfennimore@co.marion.or.us](mailto:gfennimore@co.marion.or.us))

(via email: [lmilliman@co.marion.or.us](mailto:lmilliman@co.marion.or.us))

#### Code Enforcement

(via email: [lpekarek@co.marion.or.us](mailto:lpekarek@co.marion.or.us))

#### Building Inspection

(via email: [deubanks@co.marion.or.us](mailto:deubanks@co.marion.or.us))

(via email: [mpuntney@co.marion.or.us](mailto:mpuntney@co.marion.or.us))

#### Survey:

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#### Assessor

(via email: [assessor@co.marion.or.us](mailto:assessor@co.marion.or.us))

#### PW Engineering

(via email: [jasmussen@co.marion.or.us](mailto:jasmussen@co.marion.or.us))

(via email: [mhepburn@co.marion.or.us](mailto:mhepburn@co.marion.or.us))

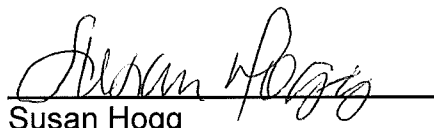
#### Silverton Fire Department

(via email: [billmiles@silvertonfire.com](mailto:billmiles@silvertonfire.com))

#### DLCD:

(via email: [hilary.foote@state.or.us](mailto:hilary.foote@state.or.us))

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 2<sup>nd</sup> day of June, 2020, and that the postage thereon was prepaid.

  
Susan Hogg  
Administrative Assistant to the  
Hearings Officer