



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: August 21, 2019

Department: Public Works

Agenda Planning Date: August 15, 2019

Time required: 5 min.

☐ Audio/Visual aids

Contact: Joe Fennimore

Phone: 503-566-4177

Department Head Signature:

Brian Nicholas

TITLE

Receive and consider appeal of hearings officer's decision denying Conditional Use/Variance Case (CU/V) 19-010/Maddux.

Issue, Description & Background

This is a request for a conditional use permit and variance to convert an existing pool house into a temporary dwelling for medical hardship purposes on a 19.54 acre parcel in an EFU zone on Parker Lane SE, Turner.

Applicant constructed a building on the property designed to provide changing rooms, bathrooms, gathering room, and a pool mechanical room. After the building was completed, modifications were made without obtaining permits that converted the building into a dwelling. As a result of an enforcement action, the applicant is now requesting that the dwelling be used as a temporary residence to house his mother and niece who are no longer able to care for themselves due to medical conditions. On April 10, 2019, the hearings officer held a public hearing and on August 1, 2019, issued a decision denying the request. On August 7, 2019, the hearings officer's decision was appealed to the board.

In the denial, the hearings officer identified three primary issues with the proposal: 1) the applicant failed to demonstrate the feasibility of obtaining an approved septic service; 2) temporary hardship dwellings must be removed or decommissioned within 90 days of the hardship no longer being needed and in this instance the applicant indicated that the planned use for the building was for it to be a permanent dwelling and that the property was for sale; and 3) applicant failed to adequately address all the variance criteria.

In the appeal the applicant explains that the building is currently being occupied without causing any septic issues. The property is no longer for sale, the intent is to live on the property as long as possible, and that the building will be decommissioned once the hardship no longer exists. The applicant also provided additional detailed information on the need for the hardship.

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.
2. Accept the appeal and schedule a public hearing on the suggested hearing date of September 18, 2019 or later.
3. Deny the appeal, thereby upholding the hearing officer's decision denying the request.



MARION COUNTY BOARD OF COMMISSIONERS

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Recommendation:	Staff recommends the board accept the appeal and schedule a public hearing on the suggested hearing date of September 18, 2019.
List of attachments:	Appeal to Marion County Board of Commissioners 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
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08/06/2019

Doris Hutmacher
7873 Parker Lane SE
Turner, Ore 97392

Conditional Use/Variance
Case#CU/V 19-010
Eric and Jessica Maddux

RECEIVED
19 AUG -7 P2:54
DAVIDSON COUNTY CLERK
MAKING COPY FOR YOU

To Whom this may concern:

My name is Doris Hutmacher. I am writing this appeal on behalf of myself and my granddaughter Leilani Maddux.

I am in receipt of Your notice received by me that denied the conditional use for the Pool house as a temporary home on 08/04/2019.

The notice stated that I had the right to appeal your findings since I am one of two individuals impacted by your current decision.

My attempt is to address your items not met as best as I can.

Item #12 page 7. Septic uses. It is stated that the current septic system is designed for a 4-bedroom home. When the pool house was built it was permitted for bathrooms/not bedrooms. **The county required a holding tank be installed at the site of the pool house and the sewage to be broke down from there and sent to the shared enlarged drain field. The drain field was upgraded and enlarged by "Ground Hog Excavation" services and permitted to accommodate the extra usage.** The current homes usage cannot be determined by bedroom space but by occupants. Myself and my granddaughter have been using this system without fail or issues in any way that have a negative impact on anything since we came to stay here. I am unemployed and under hardship awaiting disability. My granddaughter is mentally impaired and on disability. To remove us from my son's property would be to put us on the streets and homeless. There are enough homeless people in the State of Oregon that I cannot believe any county agency would

wish to deliberately add to this situation when no harm is being done to anyone or part of the property. I own a car. My granddaughter does not drive. We are quiet and low key. I fail to believe that 2 people using toilets and bathroom facilities would be a greater impact here than a bunch of people using the facilities from a swimming pool. My son does not have the funds to put in the pool that was proposed due to loss of income in their immediate household. Here sits the structure that was not cheap to build or permit. I am not married and my granddaughter left her family home due to abuse. We have nowhere else to go or be taken in.

#20 page #10. The property is no longer for sale. We decided as a family that we were best staying put due to our mental and physical conditions and the impact of trying to move or relocate all of us to proper homes. It was not in our best interests. Eric and Jessica would be able to deactivate or remove, decommission, the structure in a 90-day period of myself and my granddaughter relocating.

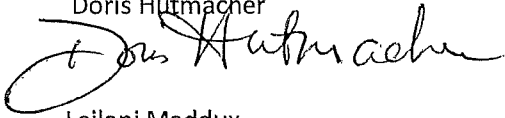
Item #20 page 10. Eric Maddux has gone into the county and called multiple times to get assistance into what they may need to do to not be in violation of the septic loads or decommission of items not permitted. He was never told specifically. I was at the hearing April 24, 2019 along with Rayne Legras who was there as an advocate on our behalf since she has experience as a board member for Linn county. At the hearing my son asked again to please just direct him to someone who would direct him and walk him thru what he is to do with a line item clear list because he was confused by the way the rules were stated. He was told to check with the county and the county kept directing him to this report which had not been written or received until now. They also stated at one point that the person deciding findings was not a county employee. It is still unclear to myself, but I will do whatever I humanly can to aid in getting things cleared up and made sufficient for a hardship dwelling. This has caused so much mental stress to my granddaughter and myself and we need assistance to know what to do to rectify. I am attempting to appeal to those items I can myself based on my own knowledge.

#28 and 29 page 12. How do we prove no significant adverse effects to the property? I am 57 years old. My granddaughter is 21 and handicapped. We have had no complaints from anyone to our existence here. Our neighbors are all on farm acreages. We have no close neighbors. My one car does not negatively impact our lane. I do not go much. We have been living here several months now with no negative impact to property or the septic system. There have been no failures or issue with the system. We have a private well and get 40 gallons per minute for water. Our systems here are in excellent working order. There are no unwanted excess cars, trucks machinery or anything that would litter or detract from any property values. It is sad that the burden of proof that we are not harming or detracting from any laws or neighbors or environment have fallen on the property owners who just wish to provide housing for their family members in need. If more people who take care of their property such as the Maddux's could easily provide a home to their homeless family members maybe more people would be off the streets. Why buy an RV or purchase a tiny mobile home when you have a perfectly capable building available in existence on your property? We do not have the money to do this. I lost my company after 25 years and I'm not in the best of health. The home in Hawaii was taken by the volcano. My granddaughter cannot work. I guess my appeal is to ask someone to help Eric understand Exactly what needs corrected and to realize that we have been here for some time now with no adverse effects on any system here on this property. If we slept on the floors in my sons home the septic system would still have the same amount of usage everyday day, day in and day out as it currently does. I physically cannot pile into a house and neither my granddaughter or myself can deal with stress it makes my autoimmune disease worse and affects her negatively with her autism syndrome. This would also change nothing except to continue to add undue

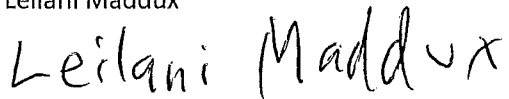
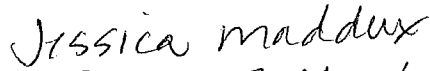
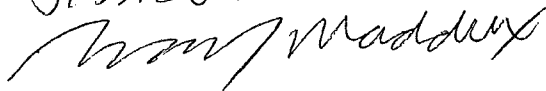
hardship to people already struggling to get by. I hope you will consider this information and help us help my family to make things lawful instead of the fees and hearings and fines that have done nothing but make our lives so much harder when it is not necessary. A phone number and a contact that will help us instead of constantly being redirected would be beneficial. We are not criminals. We just want to have a place to live while helping each other financially and physically as a family.

Sincerely,

Doris Hutmacher

A handwritten signature in cursive script, appearing to read "Doris Hutmacher".

Leilani Maddux

A handwritten signature in cursive script, appearing to read "Leilani Maddux".A handwritten signature in cursive script, appearing to read "Jessica Maddux".A handwritten signature in cursive script, appearing to read "Tom Maddux".

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)	Case No. CU/V 19-010
)	
Application of:)	Clerk's File No.
)	
ERIC AND JESSICA MADDUX)	Conditional Use/Variance

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Eric and Jessica Maddux for a conditional use permit and variance to convert a pool house to a temporary dwelling for medical hardship purposes on a 19.54-acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 7873 Parker Lane, Turner, Marion County, Oregon (T9S, R2W, S23, tax lot 1600).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.110, 17.119, 17.122 and 17.136.

III. Public Hearing

A public hearing was held on this matter on April 10, 2019. The Planning Division file was inventoried and made part of the record. The following persons appeared and provided testimony on the application:

- | | | |
|----|-----------------|-------------------|
| 1. | Lisa Milliman | Planning Division |
| 2. | Eric Maddux | Applicant |
| 3. | Doris Hutmacher | Proponent |
| 4. | Rayne Legras | Proponent |

No documents were entered into the record as exhibits. No objections were raised to notice, jurisdiction, conflicts of interest, or evidence. Applicant indicated he would like to consult counsel, so the hearing was continued to April 24, 2019. Because a date, time and place certain were announced for the continued hearing, no additional notice was required.

The continued hearing was held on April 24, 2019. Lisa Milliman, Marion County Planning, and applicant Eric Maddux appeared and provided testimony on the applications. The following documents were entered into the record as exhibits:

- | | |
|-------|--|
| Ex. 1 | Packet of building inspection related documents containing 28 sheets of paper, numbered 1 through 28 by the hearings officer for ease of reference |
| Ex. 2 | June 13, 2018 letter from Lisa Miura, County of Hawai'i |

The impartial tribunal is a long existing principle of land use law first announced in *Fasano v BOC*, 264 OR 574 (1973) and stating the parties to a quasi-judicial land-use hearing are entitled to a "tribunal which is impartial in the matter." 264 OR at 588. Applicant Eric Maddux raised no formal objection to notice, jurisdiction, conflict of interest evidence or testimony, but did express concern that he, as applicant, has the burden of proof. The hearings officer explained that applicants in quasi-judicial land proceedings have the burden of demonstrating that a proposal complies with relevant approval criteria and that accordingly, she must rely on the testimony, evidence and argument in the oral and written record before her when looking at the applicable criteria and making a decision on the application.¹ The hearings officer offered to keep the record open to allow applicant to supplement the record, but he declined.

IV. Findings of Fact

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

1. The subject property is designated Primary Agriculture in the MCCC and zoned EFU. A primary purpose of the designation and zoning is to promote and protect commercial agricultural operations. A temporary hardship dwelling may be approved as a conditional use if applicable criteria are met.
2. The subject property is on the north side of Parker Lane SE, about 1,150 feet east of the Woodpecker Drive SE - Parker Lane SE intersection. The property contains a dwelling, pool house, agriculture-exempt building, well and septic system. The Planning Division notes that CU 87-73 approved placement of a manufactured home on the subject property as a temporary medical hardship dwelling. The dwelling was apparently removed and the use discontinued, but the prior approval is evidence that the subject property is a legal parcel for land use purposes.
3. A permitted pool house replaced a machine shed on the subject property. At some time alterations were made to the pool house and it became occupied by applicant Eric Maddux's mother and niece. Eric and Jessica Maddux now apply to use the pool house as a medical hardship dwelling.
4. According to the Soil Survey of Marion County Area, Oregon, 100% of the property is composed of high-value farm soils. All surrounding properties are zoned EFU and are in farm use.
5. The Marion County Planning Division requested comments on the application from various governmental agencies.

Marion County Code Enforcement submitted a letter to applicants from the Marion County Building Official (MCBO) alleging Oregon Residential Specialty Code (ORSC) mechanical violation for adding a kitchen hood without required permits and inspections, structural

¹ "Since *Fasano v. Board of County Commissioners of Washington Co.*, 264 Or 574, 507 P2d 23 (1973), applicants in quasi-judicial land use proceedings have had the burden of demonstrating that a proposal complies with relevant approval criteria." *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

violation for adding a closet without required permits and inspections, and for changing the use and/or character of the pool house to dwelling without required permit and certificate of occupancy. The MCBO ordered correction of violations.

Marion County Building Inspection (MCBI) commented that a building permit is required for a change in use or occupancy, that authorization and possible alteration of the existing septic system is required, and that the current septic system is being used in violation of permit conditions.

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

V. Additional Findings of Fact and Conclusions of Law

1. In land use cases, applicants have the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. Preponderance of the evidence is 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.)

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If evidence for any criterion is equal or less, applicant’s burden is not met and the application shall be denied. If evidence for every criterion is in applicant’s favor, the burden is met and the application shall be approved.

CONDITIONAL USE

MCC CHAPTER 17.119

2. Under MCC 17.119.020, an application for a conditional use may only be filed by certain people, including owner of property subject to the application. A statutory warranty deed recorded at reel 3744, page 32 of the Marion County deed records shows the subject property was conveyed to Eric Maddux and Jessica Maddux on September 18, 2015. Eric and Jessica Maddux own the subject property and could file the application. MCC 17.119.020 is satisfied.
3. Under MCC 17.119.025, conditional use applications must be signed by certain people, including all owners of the property. Property owners Eric and Jessica Maddux signed the application. MCC 17.119.025 is satisfied.

4. Under MCC 17.119.100, the Planning Director has the power to forward an application to the hearings officer for the initial decision. In such case, the hearings officer shall conduct a public hearing on the application pursuant to MCC 17.119.150.
5. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:
 - (A) That the hearings officer has the power to grant the conditional use;
 - (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
 - (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
6. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. Applicant asks for a conditional use permit to establish a medical hardship dwelling in an existing structure on the subject property in the EFU zone. MCC 17.136.050(B) lists a temporary residence for hardship purposes, subject to MCC 17.120.040 requirements, and with the filing of a declaratory statement in MCC 17.136.100(C), as a conditional use in the EFU zone. The hearings officer may hear and decide this matter. MCC 17.119.070(A) is met.
7. MCC 17.136.010 contains the EFU zone purpose statement:

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

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

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

The EFU zone is also intended to allow other uses that are compatible with agricultural activities, to protect forests, scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

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

MCC 17.136 provisions are intended to carry out the purpose and intent of the EFU zone. If applicable MCC 17.136 and, by reference MCC 17.120.040, and other criteria are met, the proposed use will be in harmony with the purpose and intent of the zone. MCC 17.136 and other applicable criteria are discussed below and are not all met. The proposed use is not in harmony with the purpose and intent of the EFU zone. MCC 17.119.070(B) is not met.

8. Without all applicable criteria met, the use cannot be approved, and no conditions can attach. MCC 17.119.070(C) is not applicable.

MCC CHAPTER 17.136

9. **MCC 17.136.060(A).** According to MCC 17.119.010, a conditional use is an activity that is similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. The following MCC 17.136.060(A) criteria apply to all conditional use application reviews in the EFU zone:
 1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
 2. Adequate fire protection and other rural services are, or will be, available when the use is established.

3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
10. *Farm and forest practices.* Under *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), a county must first identify accepted farm and forest practices occurring on surrounding farmland and forestland, and then analyze whether a proposed use will force a significant change in those accepted farm and forest practices, or will significantly increase the cost of those practices. The subject property is in a flat area, and according to applicant the person farming applicants' upper field has grown beans and hay in the past. From an aerial photo in the record, it appears the cropped upper portion of the subject property may be farmed in conjunction with neighboring property. Applicant testified that emu are raised on property to the west and hazelnuts are planned for a northwest property. Grass seed is also grown in the area. Applicant reported farm practices such as irrigation and ground level spraying. Plowing, planting and harvesting are also common farm practices. No field burning is noted. No timber operations are identified. The pool house and proposed residential use are fairly well insulated by distance from surrounding farm uses. With a condition requiring applicant to sign and record a farm/forest declaratory statement, it is more likely than not that the proposed use will not interfere with farm or forest practices. As conditioned, MCC 17.136.060(A)(1) is met.
11. *Adequate fire protection and other rural services.* Utilities, such as electric and telephone services are currently available to the site. Police services are provided by Marion County. Stayton Fire District provides fire protection services for the subject property. MCPW noted no traffic safety or property access issues. On-site water and septic services are in place on the property but according to MCBI comments, the current septic system is being used in violation of permit conditions. Applicant disputes this contention, saying that all septic has been approved by Marion County. A certificate of satisfactory completion in exhibit 1 shows that septic approval for the pool house was received in November 2016 under permit 555-16-003107-SEP. The on-site septic review letter issued October 19, 2016 by a county wastewater specialist, also at exhibit 1, states:

Approved Area & System Type

Marion County file records indicate the area around the existing drainfield is CAPABLE of supporting a STANDARD SEPTIC SYSTEM for the replacement drainfield. Please refer to the REVISED signed approved site plan dated October 19, 2016. *Any deviation from the approved plans must be authorized by this office prior to installation or the permit may be voided.*

The septic system at this address is designed for two separate structures, and consists of two tanks and one drainfield. This design is to serve a single family dwelling of up to four bedrooms and a separate pool house with no bedrooms. Peak sewage flow into the system is limited to a maximum of 450 gallons per day, with an average sewage flow of not more than 225 gallons per day. This permit DOES NOT infer additional living space in the accessory structure and DOES NOT provide for additional sewage flow. Premature failure of the treatment system may occur if either of these flow quantities is exceeded. *If, for some reason, you expect your domestic household water use may exceed these flows, it may be advisable to increase the size of the treatment system.*

Specific Requirements

SEPTIC TANK: 1000-gallon dosing to serve pool house

DRAINFIELD: Standard trenches

Length: 300 lineal feet

Depth: minimum 18"; maximum 30"

(Bold, underlining, italics and capitalization in the original.)

A septic application document at exhibit 1, also for permit 555-16-003017-SEP, issued June 16, 2016, in the APPLICATION SPECIFIC INFORMATION section, affirms the number of bedrooms under the permit is zero.

These documents show the system was designed and approved for a nonresidential accessory pool house and not a two bedroom residence. There are no newer permitting documents in the record showing approval of the system for the current residential use of the pool house. Without an updated evaluation or other evidence showing it is feasible to provide on-site wastewater disposal for the proposed use, applicants have not proven it is more likely than not that satisfactory on-site wastewater disposal service is available or can be made available. With a showing of feasibility, septic permitting might be made a condition of approval for this criterion, but without this showing, no condition will be attach. **MCC 17.136.060(A)(2) is not met.**

12. *Significant adverse impact.* The subject site is not in an MCCP-identified sensitive groundwater, headwater, stream, geologically hazardous, wildlife or big game habitat area. No alteration of topography will occur. Residential use of the pool house is not likely to generate any significant particulate discharge into the air. There will be no significant threat to fish and wildlife habitat, soil and slope stability, and air quality. As noted above, feasibility of obtaining wastewater permitting approval has not been proven. Wastewater permitting is important for groundwater protection. Without some showing of feasibility of obtaining approved septic service, no condition will be attach. **MCC 17.136.060(A)(3) is not met.**
13. *Noise.* The subject structure is well-insulated from other dwellings by distance, and normal residential use of the subject building will not likely produce disturbing sound. **MCC 17.136.060(A)(4) is met.**

14. *Water impounds/mineral and aggregate sites.* No MCCC identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is met.
15. **MCC 17.136.100(C).** Under MCC 17.136.100(C), for all dwellings, and other uses deemed appropriate, the property owner shall be required to sign and allow the entering of the following declaratory statement into the chain of title of the lot(s) or parcel(s):

The property herein described is situated in or near a farm or forest zone or area in Marion County, Oregon, where the intent is to encourage, and minimize conflicts with, farm and forest use. Specifically, residents, property owners and visitors may be subjected to common, customary and accepted farm or forest management practices conducted in accordance with federal and state laws that ordinarily and necessarily produce noise, dust, smoke and other impacts. The grantors, including their heirs, assigns and lessees do hereby accept the potential impacts from farm and forest practices as normal and necessary and part of the risk of establishing a dwelling, structure or use in this area, and acknowledge the need to avoid activities that conflict with nearby farm and forest uses and practices, grantors will not pursue a claim for relief or course of action alleging injury from farming or forest practice for which no action is allowed under ORS 30.936 or 30.937.

The declaratory statement would be required as a condition of any approval. As conditioned, MCC 17.136.100(C) would be satisfied.

MCC CHAPTER 120

16. Under MCC17.120.040, temporary use of a mobile home or recreational vehicle for the care of someone with a hardship may be approved as a conditional use subject to meeting the following criteria:
 - A. For the purposes of this section "hardship" means a medical hardship or hardship for the care of an aged or infirm person or persons.
 - B. A doctor of medicine or licensed psychologist shall sign a statement indicating the physical or mental condition that prevents the person(s) with the hardship from providing the basic self-care needed to live on a separate lot. The statement shall also attest that the physician or licensed psychologist is convinced the person(s) with the hardship must be provided the care so frequently or in such a manner that the caretaker must reside on the same premises.
 - C. Those providing the needed assistance shall be related by blood, marriage or legal guardianship and reside in another residence on the property. If evidence is presented that there is no family member able to provide the needed care the caretaker may be someone else provided the property is located in a zone other than the EFU, SA, FT or TC zones. In the EFU, SA, FT and TC zones, occupancy of

the hardship mobile home or recreational vehicle is limited to the term of the hardship suffered by the existing resident or a relative as defined in ORS 215.283.

- D. Those providing the care must show that they will be available and have the skills to provide the primary care required by the doctor or psychologist.
 - E. One of the residences shall be removed from the property within 90 days of the date the person(s) with the hardship or the care provider no longer reside on the property. In the case of a recreational vehicle it shall be rendered uninhabitable by disconnection from services. An agreement to comply with this requirement shall be signed by the property owner and the care providers. Oregon Department of Environmental Quality removal requirements also apply.
 - F. The mobile home or recreational vehicle shall to the extent permitted by the nature of the property and existing development:
 - 1. Be located as near as possible to other residences on the property;
 - 2. On EFU, SA, FT and TC zoned property, be located on the portion of the property that is least suitable for farm or forest use, if it is not feasible to locate it near an existing residence;
 - 3. Not require new driveway access to the street;
 - 4. Be connected to the existing wastewater disposal system if feasible. The disposal system shall be approved by the county sanitarian.
 - G. The use is intended to be temporary, shall be subject to review every year, and shall continue to meet the above criteria in order to qualify for renewal.
17. The proposed hardship dwelling is neither a manufactured home nor a recreational vehicle. Without a variance the pool house cannot be used as a temporary dwelling. The variance application is discussed later in this order.
18. Applicants submitted Medical Care Provider Certificates for Doris Hutmacher, mother of applicant Eric Maddux, and for Leilani Maddux, applicants' niece. Based on this evidence, Doris Hutmacher's and Leilani Maddux's circumstances constitute hardship conditions relating to the aged, the infirm, or persons otherwise incapable of maintaining a complete, separate and detached residence apart from family. Doris Hutmacher is guardian of Leilani Maddux and is responsible for Leilani's care, but sometimes Ms. Hutmacher's own medical condition becomes too debilitating for her to care for Leilani. At those times, Jessica and Eric Maddux provide assistance to Ms. Hutmacher and Leilani Maddux. Jessica and Eric Maddux are related by marriage or blood to Ms. Hutmacher and Leilani Maddux. Jessica Maddux works from home and is normally available, and Eric Maddux is also available to provide care such as transportation to appointments, house work, feeding and supervision of normal daily functions as needed. MCC 17.120.040(A) through (D) are met.

19. MCC 17.120.040(E) allows no more than 90 days to remove one of the residences from the property after a hardship ends, but in the conditional use application, applicants state, "the plan for use is the pool house becoming a permanent residence." This indicates no intent to remove or deactivate the residence. Mr. Maddux also acknowledged applicants are trying to sell the subject property. If temporary residential use of the pool house is allowed, there could be insufficient time to remove or deactivate the dwelling if the hardship use ceases on transfer of property ownership. Early decommissioning or removal might help ensure there will be no ongoing issue with residential use of the pool house after ownership transfer, but this option was not addressed by applicants, and no condition will attach.² **MCC 17.120.040(E) is not met.**
20. The pool house is about 50' from the primary dwelling, uses the same driveway and is served by an onsite sewage system designed, approved and installed for the limited purpose of a pool house. The system includes a separate septic tank that connects to a drainfield shared with the existing residence. The approved septic site evaluation says the pool house has no bedrooms and specifies average daily and maximum sewage loads for the use. The evaluation says the permit, "DOES NOT infer additional living space in the accessory structure and DOES NOT provide for additional sewage flow." The system was approved by the sanitarian at one time, but now, according to MCBI, the system is being used in violation of permit conditions. **MCC 17.120.040(F)(4) is not met.**
21. If this application were approved, yearly review would be made a condition of approval. With this condition, MCC 17.120.040(G) would be met.

VARIANCE

22. Under MCC 17.122.040 and MCC 17.122.045, variance applications may be filed and must be signed by certain people, including property owners. These are the same requirements for filing and signing the conditional application, and were shown to be met above. MCC 17.122.040 and .045 are met.
23. Under MCC 17.122.010, the hearings officer has the power to vary or modify the strict application of any of the standards of MCC title 17 in any case where such strict application would result in practical difficulties or unnecessary hardships with reference to requirements governing: lot area, lot width, percentage of lot coverage and number of dwelling units or structures permitted on a lot, height of structures, location, yards, signs, parking and loading space, vision clearance and other standards when limits for an adjustment in MCC 17.116.030 are exceeded. Variances to allow uses or new uses not otherwise allowed are prohibited. Variances to criteria and definitions are also prohibited.

Under ORS 215.283(2)(L), manufactured homes, recreational vehicles (RVs) and existing buildings may be used as temporary hardship dwellings with review and approval. The MCC allows only manufactured homes and RVs as temporary dwellings. The Planning Division treats use of existing structures for temporary medical hardship dwellings as a standard

² If feasibility were shown, the county would not be under any general obligation to impose conditions of approval so a permit application can be approved. See *Falls v. Marion County*, ____ Or LUBA ____ (2010), citing *Simonson v. Marion*, 21 Or LUBA 313, 325 (1991) and others.

that can be varied. For purposes of this application, the hearings office accepts that interpretation and evaluates this request under MCC 17.122.020.

24. Under MCC 17.122.020(A), the director, planning commission, hearings officer, or board may permit and authorize a variance when it appears from the application and the facts presented that:
1. There are unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of this title; and
 2. There are unusual circumstances or conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the same zone; however, nonconforming land uses or structures in the vicinity or violations of land use regulations or standards on the subject property shall not in themselves constitute such circumstances or conditions; and
 3. The degree of variance from the standard is the minimum necessary to permit development of the property for the proposed use; and
 4. The variance will not have a significant adverse effect on property or improvements in the neighborhood of the subject property; and
 5. The variance will not have a significant adverse effect upon the health or safety of persons working or residing in the vicinity; and
 6. The variance will maintain the intent and purpose of the provision being varied.

25. *Hardship or practical difficulty.* Mr. Maddux testified that his mother, Doris Hutmacher, was living in a home he and Jessica Maddux owned in Hawai'i when the home was destroyed by volcanic activity. A June 13, 2018 letter at exhibit 2 from County of Hawai'i confirms all structures on the property burned and roadway access was lost. The letter explained that taxes for property tax year 2017 (July 1, 2017 through June 30 2018) would be prorated and taxes for the next tax year would be zero, indicating the damage occurred between July 1, 2017 and June 30 2018. After loss of the house, Ms. Hutmacher became guardian for Leilani Maddux; Mr. Maddux's niece. Ms. Hutmacher and Leilani Maddux relocated to Oregon and began living in the pool house on the Maddux property. Applicants now ask to use the pool house as a temporary hardship dwelling. Mr. Maddux explained it is more practical to have his family in the existing building which has a kitchen and bathrooms. Mr. Maddux noted that the structure is still an existing structure whether it is lived in or not, and the county has allowed existing structure use before so why not allow him the same thing.

It might be practical or convenient for applicants to use the pool house structure as a temporary dwelling, but applicants must address what specific unnecessary or unreasonable hardship or practical difficulty result from *not* using the pool house. Without substantial, detailed evidence in the record, the hearings officer find applicants have not

met the burden of proving it more likely than not that unnecessary or unreasonable hardship or practical difficulty are present that can only be relieved by modifying MCC title 17 requirements. **MCC 17.122.020(A)(1) is not met.**

26. *Unusual circumstances or conditions.* The subject property is a relatively flat 20-acre EFU zoned parcel, with about half the property cropped. An aerial photograph in the record shows similar farm fields nearby. The temporary hardship dwelling use is a listed conditional use in all MCC rural resource zones. The subject structure, in its original form as a pool house, might not be the most common structure in an EFU zone, but nothing shows its presence is unusual. It may be unusual to have a non-dwelling structure converted to a dwelling without permits, but as stated in the variance criteria, violations of land use regulations or standards on the subject property "shall not in themselves constitute such circumstances or conditions." Applicants did not provide proof of unusual circumstances or conditions applying to applicants' buildings, uses or land that do not apply generally to buildings, uses or land in the EFU zone. **MCC 17.122.020(A)(2) is not met.**
27. *Degree of variance.* This criterion is somewhat difficult to evaluate. The subject property is already developed for farm and residential use. If this criterion is interpreted to apply just to hardship dwelling development and not to development of the property as a whole, applicants might supply evidence to support a positive finding, but currently this record lacks that evidence. **MCC 17.122.020(A)(3) is not met.**
28. *Property or improvements.* The pool house is a nice looking, existing structure, and Mr. Maddux says his property improvements have raised property values in the neighborhood rather than being detrimental to the neighborhood. But it is not clear from the record that a proper septic system can be installed to support the proposed use, and it is not clear what affect septic failure would have on shared groundwater in the area. It is up to applicant to prove it is more likely than not that the variance would have no significant adverse effect on property or improvements in the neighborhood, but applicants have not yet provided that proof. **MCC 17.122.020(A)(4) is not met.**
29. *Working or residing.* Similar to (V)(28) above, it is not clear from the record that a proper septic system can be installed, and what affect a failure would have on shared groundwater in the area. It is up to applicant to prove it is more likely than not that the variance would have no significant adverse effect on health or safety of persons working or residing in the vicinity, but applicants have not yet provided that proof. **MCC 17.122.020(A)(5) is not met.**
30. *Intent and purpose.* The EFU zone is restrictive, and dwellings are strictly controlled under state laws and rules. Temporary hardship manufactured home, recreational vehicle, and existing structure dwellings are conditionally permitted by state law under certain circumstances. Counties may enact stricter, but not more lenient, EFU zone laws to address local needs. Marion County's governing body did not adopt the portion of state law allowing existing structures as temporary hardship dwellings. County law is more restrictive. Reasoning behind exclusion of the existing structure provision is not stated in the MCC, but this is not the only instance where the county adopted more restrictive dwelling-related EFU zone provisions.

Under state law, a county "may allow" what are commonly known as lot of record dwellings in EFU zones. Marion County does not allow lot of record dwellings in the EFU zone, though it allows them in the SA (Special Agriculture) zone; the county's other EFU-compliant farm zone. It is reasonable to infer that proliferation of permanent dwellings in the EFU zone is a concern for the county. RVs can be driven away and manufactured dwellings are transported onto a property and can be transported off. Stick-built dwellings are not quite as mobile, and may not be as easily removed, deactivated or monitored. Here, things may be more complicated because applicants intend to move from the property and it is not clear when removal or deactivation might occur because the hardship and ownership could co-terminate. Without more information, it is not clear whether the variance would maintain the intent and purpose of the provision being varied. **MCC 17.122.020(A)(6) is not met.**

MCC 17.110.680

31. Under MCC 17.110.680:

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

Wastewater permitting. On-site wastewater service is in place on the property but according to MCBI, the current septic system is being used in violation of permit conditions. Applicants dispute this contention, saying that all septic has been approved by Marion County. This argument was addressed in (V)(11) above, and is incorporated here. MCBI determined septic permit conditions have been violated and applicants did not show the issue has been resolved.

Order to correct. On February 12, 2019, the MCBO sent applicants an order to correct ORSC violations for mechanical and structural work in the pool house done without permits and inspections, and for changing the use and/or character of the pool house without permit and certificate of occupancy. The letter says the violation may be corrected in the following ways:

Obtain any and all of the necessary mechanical and structural permits and subsequent inspections for the pool house and make all necessary corrections to bring your building into compliance and cease the use of the pool house as a dwelling.

There is no indication in this record that building violations have been cured.

Applicant may challenge these MCBI determinations in other fora, but at this time these stand as county code violations. Based on the evidence in this record, applicant has not

proven it is more likely than not that approving or conditionally approving these applications will cure the violations. The subject land use applications cannot be approved.

VI. Order

It is hereby found that applicants have not met the burden of proving applicable standards and criteria for approval of conditional use and variance applications to convert a pool house to a temporary dwelling for medical hardship purposes on a 19.54-acre parcel in an EFU zone have been met. Therefore, the conditional use application is **DENIED**.

VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 16th day of August 2019. 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 1st day of August 2019.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Eric and Jessica Maddux
7873 Parker Lane S.E.
Turner, OR 97392

Agencies Notified

Planning Division

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

(via email: breich@co.marion.or.us)

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Stayton Fire Department

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Roger Kaye
Friends of Marion County
P.O. Box 3274
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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 19 day of August, 2019, and that the postage thereon was prepaid.



Susan Hogg

Secretary to the Hearings Officer