



MARION COUNTY BOARD OF COMMISSIONERS


Board Session Agenda Review Form

Meeting date: September 18, 2019

Department: Public Works Agenda Planning Date: Sept. 12, 2019 Time required: None

☐ Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature: 

TITLE Receive hearings officer's decision upholding the planning director's decision revoking Conditional Use (CU) Case 16-014/Klopfenstein.

Issue, Description & Background On April 11, 2019, the planning director determined that the petitioners had not complied with all conditions of approval for CU16-014 and revoked the conditional use permit. On April 24, 2019, that decision was appealed to the Marion County Hearings Officer who conducted a public hearing on May 14, 2019. On September 10, 2019, the hearings officer issued a decision upholding the planning director's revocation and denied petitioner's request for additional time to meet the conditions.

Financial Impacts: None.

Impacts to Department & External Agencies None.

Options for Consideration: As part of the land use process, the board must officially receive the hearings officer's decision.

Recommendation: Staff recommends the board of commissioners receive the hearings officer's 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)	Case No.	CU 16-014
)		
Appeal of:)	Clerk's File No.	
)		
WALTER & KAREN KLOPFENSTEIN)	Conditional Use Revocation	

ORDER

I. Nature of the Appeal

This matter comes before the Marion County Hearings Officer on Walter and Karen Klopfenstein's appeal of the Planning Director's decision to revoke conditional use (CU) permit 16-014, approved by Marion County Board of Commissioners (BOC) order 17-027.

II. Relevant Criteria

Standards and criteria relevant to this appeal are found in the Marion County Code (MCC), chapter 17.110.

III. Public Hearing

A public hearing was held on May 14, 2019. Planning Division file CU 16-014 was made part of the record. The following persons appeared and testified at hearing:

- | | | |
|----|---------------------|---------------------------------|
| 1. | Walter Klopfenstein | Petitioner |
| 2. | Matthew Buchheit | For petitioner |
| 3. | Joe Fennimore | Marion County Planning Director |
| 4. | George Harris | Neighbor |
| 5. | Patricia Harris | Neighbor |
| 6. | Lisa Hodson | Neighbor |

The following documents were entered into the record as exhibits:

- | | |
|-------|---|
| Ex. 1 | Statement by Freida Pike |
| Ex. 2 | Statement by George Harris, including photographs of the subject property |
| Ex. 3 | Hand-drawn map of the subject property |

No objections were made to notice, jurisdiction, conflict of interest, evidence or testimony at the hearing.

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, in the northwest corner of the Selah Springs Road NE-Cascade Highway NE intersection, is designated Primary Agriculture and zoned exclusive farm use (EFU). Case CU 78-80 approved a commercial activity in conjunction with farm use on the property for farm equipment and machinery repair. In case CU 16-014, BOC order 17-027 modified conditions of approval from CU 78-80 by revising an employee cap and allowing some non-farm vehicle repair to the previously approved farm equipment repair business.
2. On April 11, 2019, the Planning Director determined petitioners had not complied with all CU 16-014 conditions and revoked the conditional use permit. Petitioners ask the hearings officer to reconsider the revocation and allow additional time to meet permit conditions.

V. Additional Findings of Fact and Conclusions of Law

1. Petitioners have the burden of proving by a preponderance of the evidence that they have shown cause why conditional use permit 16-014 should not be revoked. 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.)

Petitioners must prove, by substantial evidence in the record it is more likely than not, that conditional use permit 16-014 should not be revoked. If the evidence is equal or less, petitioners’ burden is not met, and the hearings officer may revoke the permit, or grant a reasonable time for compliance with the conditions of approval. If the evidence is in petitioners’ favor, the burden is met and the hearings officer will reverse the Planning Director’s decision.

PRELIMINARY MATTERS

2. Under MCC 17.110.680, the Planning Director has the power to revoke any land use permit for certain reasons. The director’s decision revoking a land use permit may be appealed to the hearings officer. The hearings officer shall hold a public hearing to allow the permit holder to show-cause why the permit should not be revoked. The Planning Director allowed petitioners 15 days from the mailing date of the director’s revocation letter to appeal the decision. The director’s decision was mailed on April 11, 2019. Petitioners appealed the decision on April 24, 2019. Petitions’ appeal was timely. The hearings officer may hear and decide this matter.

CRITERIA

3. MCC 17.110.680 provides:

Any land use permit granted pursuant to this title shall be subject to revocation by the director if the director determines that the application for the permit included any false or misleading information, if the conditions of approval have not been complied with or are not being maintained, or if the land use is not being conducted in full compliance with the requirements of local, state and federal laws.

The director's decision revoking a land use permit may be appealed to the hearings officer, who shall hold a public hearing in order for the permit holder to show cause why the permit should not be revoked. No hearing may be held without a minimum 12 days' notice to the permit holder.

If the hearings officer finds that the conditions of permit approval have not been complied with or are not being maintained, or that the land use is not being conducted in compliance with applicable laws, the hearings officer may grant a reasonable time for compliance. If corrections are not made within that time, the permit shall be revoked effective immediately upon expiration of the time specified. The hearings officer's decision may be appealed to the board as provided in MCC 17.122.120.

It is not alleged that the permit application included false or misleading information or that the use is not being conducted in full compliance with local, state and federal law requirements. The Planning Director's April 11, 2019 letter to the permit holders states the permit was revoked for noncompliance with certain permit approval conditions.

COMPLIANCE WITH CONDITIONS OF APPROVAL

4. On March 1, 2017, in order 17-027, the Marion County BOC approved CU 16-014, modifying a previously approved farm equipment repair business on the subject property by raising an employee cap and allowing some non-farm vehicle repair. The approval was subject to conditions of approval set out in order exhibit B.

Exhibit B conditions require, among other things, that no more than 25% of gross income generated by the business shall come from repair of non-farm automobiles or other non-farm vehicles (the "income standard"). Conditions also required the permit holders to maintain detailed records of the repairs being conducted and to submit an annual report of income to the Planning Director by March 15th for the previous calendar year. Reports were required for years 2017, 2018, and 2019, and if the reports demonstrated the income standard was met for three consecutive years, no further reporting would be required. The condition stated that failure to maintain 75% of sales to the local agricultural community in any given year shall not, in itself, be grounds to terminate or disallow the use as approved, unless sales to the local agricultural community fall below 51% for two consecutive years.

Reports submitted by petitioners show 70.15% of income in 2017 and 63.57% of income in 2018 was from repair of non-farm related vehicles, exceeding the 25% allowed maximum for both years. But, CU 16-014 conditions also provide that failure to maintain 75% of sales to the local agricultural community in any given year does not automatically terminate the permit, unless sales to the local agricultural community fall below 51% for two consecutive years. Here, sales to the agricultural community were 29.85% in 2017 and 36.43% in 2018. Because agricultural related sales fell below 51% for two consecutive years, the Planning Director revoked the permit.

Petitioners submitted the following written statement with their appeal:

We are asking for a re-consideration of the revoking of the conditional use (CU) 16-014. Since this business was given a conditional use, in the two years the percentage did drop for non-farm related vehicles. This farm community has been bringing more mechanical work to Mr. Bucheit each year, as word is getting out about his ability to repair anything. While he has not met the quota, he feels that he will be able to next year.

A bit of history to this business, the shop was originally approved in 1978, due to a need in the community, and this one acre piece of ground was sitting vacant and unfarmed for years. When Mr. Butler originally opened this shop he hired Walter to work for him. Walter worked for him for 15 years, then brought his own equipment for repair. Walter has firsthand knowledge of the community's needs and the changes that occurred in the 40 years. The original need is still here, the neighbors came to Walter expressing the need for this repair shop when it was thought it might close down.

While there is still a great need for older tractors and equipment to be serviced here, it isn't being reflected in the percentages. As the need for using new parts which would increase the price and increase the percentages isn't necessary, but welding and fabricating that has a lower dollar amount thus skewing his ability to have meet the 51% the past two years. Where the cars now need to have the parts replaced instead of fabrication, thus increasing the price of the repair, showing a greater percentage advantage to the non-farm related vehicles. This affects the percentages of non-farm and farm related.

With no complaints about this shop, and all we hear is gratefulness for this shop, we are asking for a re-consideration. With the percentages of farm repairs going up from 2017 to 2018, we are asking for one more year. As word has gotten out that Mr. Bucheit is very capable of working on any farm equipment, with summer (the busy season for farmers starting) the need is the greatest now for the shop to remain open. So we are asking for another year to get the farm related percentages up to where they need to be. After

40 years of being here closing this business will be a hardship on the community and a great loss.

Matthew Buchheit testified at hearing as the owner of Howell Automotive, the business operating on the subject property. Mr. Buchheit stated that he believes the business can reach 51% of agricultural sales in 2019. When the hearings officer clarified that the standard is 75%, and asked Mr. Buchheit about reaching that standard, Mr. Buchheit admitted that reaching 75% farm-related sales is nearly impossible to achieve, stating: "There is not enough work that is exclusively farm-related." Written statements and oral testimony provided by neighbors confirm that the business appears to be operating more as an auto repair shop.

At the hearing, Mr. Buchheit pointed to the demand for auto repair as evidence that there is a need for this business. While there appears to be demand for auto repair services, the issue here is location of the service rather than demand. The Marion County zoning code sets out specific areas where demand for non-farm related auto repair can be met, specifically, though not exclusively, in the commercial zone. The EFU zone's purpose is to provide areas for continued practice of commercial agriculture. See MCC 17.136.010. Under MCC 17.119.010, a conditional use is an activity that is similar to other uses permitted in the zone, and review of a proposed conditional use ensures it will be in consonance with the purpose and intent of the zone. In imposing conditions for approval of CU 16-014, the BOC determined that allowing a maximum of 25% of non-farm related repairs would keep the use in consonance with the purpose and intent of the EFU zone. If there is not enough farm-related demand, the use is, more likely than not, incompatible with the EFU zone.

The percentage of farm-related repairs did increase from 2017 to 2018, but it still fell far below the 75% requirement and, by Mr. Buchheit's own admission, achieving that requirement in the future is unlikely. And, had farm-related sales been at least 51% in 2017 or 2018, petitioners would have had another opportunity to try to meet the income standard. Because neither year met at least 51% farm-related sales, the CU permit was appropriately revoked by the Planning Director.

Based on the evidence and testimony in the record, the hearings officer finds not all CU 16-014 conditions have complied with and, more likely than not, cannot be complied with. The conditional use revocation is upheld. Because meeting the 75% farm sale requirement is, more likely than not, infeasible, additional time to meet the conditions is not granted.

VI. Order

It is found that the conditions of CU 16-014 have not been complied with. The hearings officer affirms the Planning Director's decision and revokes CU 16-014, and denies petitioners' request for additional time to meet the conditions.

VII. Appeal

This determination may be appealed to the Marion County Board of Commissioners, as provided in MCC 17.122.120.

DATED at Salem, Oregon, this 10th day of September 2019.

A handwritten signature in dark ink, appearing to read 'Ann M. Gasser', is written over a horizontal line.

Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

George and Patricia Harris
4177 Cascade Hwy NE
Silverton, OR 97381

Walter and Karen Klopfenstein
3732 Cascade Hwy NE
Silverton, OR 97381

Mathew Bucheit c/o Howell Automotive
12175 Selah Springs Road NE
P.O. Box 1038
Silverton, OR 97381

Darlene Huddleston
12142 Selah Springs Road NE
Silverton, OR 97381

Lisa Hodson
4257 Cascade Hwy NE
Silverton, OR 97381

Mathew Bucheit
6122 Brush Creek Road NE
Silverton, OR 97381

Roger Kaye
Friends of Marion County
P.O. Box 3274
Salem, OR 97302

Agencies Notified:

Planning Division

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

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

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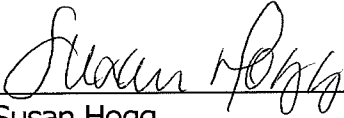
Silverton Fire District

(via email: billmiles@silvertonfire.com)

Dawn Olson (AAC Member No. 7)
15056 Quall Road
Silverton, OR 97381

James Sinn (AAC Member No. 7)
3168 Cascade Hwy NE
Silverton, OR 97381

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 10th day of September, 2019, and that the postage thereon was prepaid.



Susan Hogg
Secretary to the Hearings Officer