



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: December 11, 2019

Department: Public Works Agenda Planning Date: Dec. 5, 2019 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature: Brian Nicholas

TITLE: Receive hearings officer's decision dismissing Conditional Use (CU) Case 19-024/Jupiter Pharma, LLC.

Issue, Description & Background: The Marion County Hearings Officer conducted a public hearing on August 14, 2019, and the record was left open for written testimony until October 16, 2019. On November 26, 2019, the hearings officer issued a decision dismissing 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

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the ) Case No. CU 19-024  
)  
Application of: ) Clerk's File No.  
)  
JUPITER PHARMA, LLC on property owned by ) **Conditional Use**  
RONALD W. and ROSEMARY G. BELL, TRUSTEES)

**ORDER**

**I. Nature of the Application**

This matter comes before the Marion County Hearings Officer on the application of Jupiter Pharma, Inc., on property owned by Ronald W. Bell and Rosemary G. Bell, Trustees of the Ron and Rosemary Bell Trust dated February 9, [] for a conditional use permit to establish a hemp processing facility as a commercial activity in conjunction with farm use on two parcels, totaling 37.61 acres in an EFU (Exclusive Farm Use) zone at 8710 Parrish Gap Road SE, Salem, Marion County, Oregon (T8S, R2W, S31, tax lot 900 and S31CB, tax lot 900).

**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, 17.136 and 17.181.

**III. Public Hearing**

A public hearing was opened on this matter on August 14, 2019. The Planning Division file was inventoried and made part of the record. The record remained open until 5:00 p.m. on September 11, 2019 for participants to submit additional written testimony, argument and evidence; until 5:00 p.m. on October 9, 2019 for participants to submit written materials responsive to testimony, argument and evidence already in the record; and until 5:00 p.m. on October 16, 2019 for applicant's final argument. The following persons appeared and provided testimony on the application:

- |     |                  |  |
|-----|------------------|--|
| 1.  | Seth Thompson    | Planning Division                            |
| 2.  | John Rasmussen   | Public Works Engineering                     |
| 3.  | Michael Robinson | Applicant's attorney                         |
| 4.  | Michael Winter   | For applicant                                |
| 5.  | Todd Mobley      | For applicant                                |
| 6.  | Justin Bordessa  | Proponent                                    |
| 7.  | Brent LaFollette | Proponent                                    |
| 8.  | Wallace W. Lien  | Attorney for opponents Zamegar and Harrison  |
| 9.  | Mark Shipman     | Attorney for opponents Lulay                 |
| 10. | Andrew Mulkey    | Attorney for opponent 1000 Friends of Oregon |
| 11. | Richard Hein     | Opponent                                     |

12.	Carl Sanders	Opponent
13.	Janet Taylor	Opponent
14.	Elise Lynch	Opponent
15.	Matthew Crateau	Opponent
16.	Brent Freeborn	Opponent
17.	Will Woods	Opponent
18.	Holly Woods	Opponent
19.	Lori Davis	Opponent
20.	Paul Jablonski	Opponent
21.	John Van Dam	Opponent
22.	Kelly Rosenau	Opponent
23.	Margaret Sakoff	Opponent
24.	Sophia Sakoff	Opponent
25.	Dorothy Leedy	Opponent
26.	Tom Lovell	Opponent
27.	Trace Mills	Opponent
28.	Brian Dyer	Cloverdale School
29.	Jon Remy	Turner Fire District
30.	Darrin Drill	Cascade School District
31.	Aileen Kaye	Area Advisory Committee 1
32.	Roger Kaye	Friends of Marion County

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

- Ex. 1 August 14, 2019 statement from Richard Hein
- Ex. 2 Statement from Paul Jablonski
- Ex. 3 Statement from Elise Lynch
- Ex. 4 August 14, 2019 statement from Will Woods
- Ex. 5 August 14, 2019 statement from Aileen Kaye
- Ex. 6 August 13, 2019 statement from Susan Vaslev
- Ex. 7 August 14, 2019 statement from Daphne Ashlyn
- Ex. 8 Packet of documents from Friends of Marion County, annotated A-L by the hearings officer for ease of reference, but with I and J removed to Ex. 23
- Ex. 9 Comments of Holly Woods
- Ex. 10 August 14, 2019 statement from Andrew Mulkey
- Ex. 11 Statement from Kelly Rosenau
- Ex. 12 Statement from Jim and Pat Bouchie
- Ex. 13 Oversized revised site plan
- Ex. 14 Aerial photo with marked drainage ways/areas, and Assessor's map 082W31 annotating parcels from the aerial photo
- Ex. 15 August 14, 2019 cover letter from Michael Robinson with revised site plan and traffic information

A request was made at hearing to leave the written record open to submit additional materials. Requests were also made to continue the hearing to a later date. Under ORS 197.763(6)(a), prior to the close of the initial evidentiary hearing, any participant may ask to present additional evidence, argument or testimony on the application, and the hearings authority

shall grant the request by continuing the hearing to a later date, or by keeping the record open to submit the information in writing. The hearings officer exercised her discretion by granting an open record period. The hearings officer did not announce that decision until late into the five+ hour hearing, after some attendees had already left the hearing room. So, on August 19, 2019, the hearings officer provided attendees with the open record dates by letter, and noted that applicant agreed to extend the 150-day final decision time limit by 63 days. The following documents were submitted during the open record period.

- Ex. 16 September 9, 2019 cover email from Wallace Lien, with Mr. Lien's August 14, 2019 hearing submission
- Ex. 17 September 12, 2019 transmittal email from Andrew Mulkey, with Mr. Mulkey's attached September 11, 2019 letter
- Ex. 18 September 18, 2019 transmittal email from Hannah Warner, with Ms. Warner's attached September 11, 2019 supplemental opposition letter and exhibits A-E
- Ex. 19 September 12, 2019 email from Aileen Kaye with U.S. Bank news article
- Ex. 20 September 12, 2019 email transmittal from Holly Woods with attached September 10, 2019 statement and illustrations from Will and Holly Woods
- Ex. 21 September 11, 2019 transmittal email from Wallace Lien with attached first open record period comments and topography map
- Ex. 22 September 11, 2019 transmittal email with attached September 11, 2019 letter from Jim Bernau
- Ex. 23 Two photos of annotated maps, not submitted by Friends of Marion County
- Ex. 24 Comments from Raquel Guerrero
- Ex. 25 Transmittal email with comments from Robert Harrison and Zohreh Zarnegar
- Ex. 26 Comments from Van Dam Dairy
- Ex. 27 Email from D. Craig and Pat Anderson
- Ex. 28 September 11, 2019 comments from Brett Freeborn
- Ex. 29 Comments from Somer Riffle
- Ex. 30 Comments from Ronald Parker
- Ex. 31 Packet of documents from Zohreh Zarnegar with transmittal email, September 9, 2019 letter and the 38 articles listed in the transmittal email
- Ex. 32 September 11, 2019 letter from Friends of Marion County with listed attachments
- Ex. 33 Comments from D. Craig and Pat Anderson
- Ex. 34 Comments from Edward and Marilyn Peterson
- Ex. 35 Comments from Lorette Severson
- Ex. 36 Comments from Brett Stegall
- Ex. 37 Second supplemental testimony by Ron Johnson with attachments A-E
- Ex. 38 Comments from Barbara DeYoung
- Ex. 39 Comments from Allyson
- Ex. 40 Comments from Ron Johnson with stated attachment
- Ex. 41 August 23, 2019 Friends of Marion County letter with listed attachments
- Ex. 42 Comment in support from Jon Barricklow
- Ex. 43 Comments from Carla Moberg
- Ex. 44 Comments from Roger Kaye regarding photos of maps at exhibit 23
- Ex. 45 Comments in support by Will Landstrom
- Ex. 46 Comments from Dorothy Leedy
- Ex. 47 Comments from Raymond and Sarah Thies

- Ex. 48 Supplemental testimony from Ron Johnson
  - Ex. 49 Comments from Joe Van Den Haak
  - Ex. 50 Comment in support from Cynthia Thrapp
  - Ex. 51 Comments from Andrew Mulkey
  - Ex. 52 Comments from Ed and Shelly Jackson
  - Ex. 53 Marion County map titled Restrictions on Oversize/Overweight Vehicles and Combinations
  - Ex. 54 Comments from Dale and Dora Abraham
  - Ex. 55 Comments from Jake Sannan
  - Ex. 56 Comments from Lora and Jim Braucher
  - Ex. 57 October 9, 2019 letter from Andrew Mulkey (no exhibit 1 attached)
  - Ex. 58 Comments from Zarnegar and Harrison
  - Ex. 59 Comments from Lorette Severson
  - Ex. 60 Comments from Roger Kaye
  - Ex. 61 Comments from D. Craig and Pat Anderson
  - Ex. 62 Comment from Roger Kaye with attached Redmond news article
- \*Applicant submitted no documents during open record period\*

The hearings officer incorrectly stated during the hearing that there would automatically be a hearing before the Marion County Board of Commissioners (BOC) on this matter. The hearings officer has original decision-making jurisdiction in this matter, so in the August 19, 2019 letter mentioned above, the hearings officer explained that she would make a decision, and that the only avenue to a BOC hearing is by appeal of the hearings officer's order. The hearings officer stated that the appeal information would be provided in the upcoming order (see section VII below).

No objections were raised to conflicts of interest, testimony or evidence, but objections were raised to notice and jurisdiction. As noted above, applicant submitted nothing to the record after the close of the hearing, and in the latter submitted exhibits, it was pointed out that the subject Bell property is back on the real estate market. Applicant did not provide information necessary to approve the application as shown in section V below. Applicant did not withdraw its application, but the application appears abandoned. Additionally, the hearings officer finds below that the subject application is invalid because applicant Jupiter Pharma, LLC lacked authority to file the application; requiring dismissal. Given the dismissal and apparent abandonment of the application, the hearings officer will not address the objections raised to notice and jurisdiction, but they would need to be addressed on any appeal of this matter.

#### **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 MCCP and zoned EFU. The purpose of the designation and zoning is to promote and protect commercial agricultural operations. Non-farm uses, such as commercial activities in conjunction with farm use, may be approved when all applicable criteria are met. The property is in a Sensitive Groundwater Overlay (SGO) zone.

2. The subject property is on the east side of Parrish Gap Road SE in the 8,700 block and contains an existing dwelling, farm structures, and well. The subject property was described by deed on May 25, 1977, recorded in the Marion County deed records at Reel 223, Page 050. Under MCC 17.110.315, a lot is a unit of land created by deed prior to September 1, 1977. The subject land units are considered legal parcels for land use purposes.
3. Properties to the north, east and south are zoned EFU and are in farm use. Properties to the west are zoned SA (Special Agriculture) and are also in farm use.
4. Applicant asks to establish a hemp processing facility as a commercial activity in conjunction with farm use. Applicant's original site plan showed a 12,000 square foot processing building. There would be a 6,000 square foot administrative building; 50,000 square foot storage building; 4,800 square foot motor pool building; and 15,000 square foot building for drying hemp. Just prior to hearing, applicant submitted a revised site plan showing a 22,509 square foot extraction building, 29,889 square foot storage building and 26,520 square foot drying pad, with 123,548 square feet of pavement. Hemp fed into the processing facility would be brought to the site, dried and stored to await processing. The facility would offer third-party drying services to Oregon hemp farmers. Applicant would dry the hemp and return it to farmers without processing.
5. Marion County Planning Division requested comments on the proposal from various governmental agencies.

Marion County Public Works (MCPW) Land Development and Engineering Permits (LDEP) commented:

#### ENGINEERING CONDITIONS

*Condition A – Prior to building permit issuance, Applicant shall provide evidence of a recorded 30-foot right-of-way half-width dedication along the Parrish Gap Road frontage to meet the Minor Collector standard per the Marion County Transportation System Plan.*

Nexus for the above Condition is the anticipated increase in traffic brought about by the proposed commercial development. The requested Condition is in general accordance with Marion County Code 17.110.780(A) of the Rural Zone Code of Marion County, wherein all street rights-of-ways, pavement widths, shoulder widths and other design features shall meet Marion County Engineering Standards, and aligns with Section 17.119.060 that authorizes imposition of reasonable and necessary conditions for Conditional Uses.

*Condition B – At the time of application for building permits, Applicant will be required to apply for and obtain an Access Permit. Under the Access Permit the access to be used for the commercial activity shall be paved a minimum of 50 feet back from edge of asphalt, and there may be some requisite gravel shoulder work obliged in the vicinity of the access. The fencing and gate at the northern access shall also be removed from the public right-of-way. Vegetation trimming may be necessary to achieve adequate sight distance.*

Access is typically an Engineering Requirement but has been elevated to a Condition as a matter of timing. In accordance with Marion County Driveway Code 11.10, driveway

permits will be required for any new access or change in use of the existing access to the public right-of-way. Driveways must meet sight distance, design, spacing, and safety standards.

#### ENGINEERING REQUIREMENTS

C. A civil site plan is required for 0.5-acres or more of proposed development. This should be submitted in advance of application for building permits to allow adequate time for review. A traffic circulation and parking plan needs to be included.

D. The County requires any development having 0.5 acre or more of impervious (hard) surface to provide storm water detention. As such, the applicant may need to provide storm-water detention systems that detain enough of the storm-water runoff on site so that there is no net rate increase in storm-water flow from the subject property. Such a system shall be sized and modified so that it will detain the difference between a 5-year frequency storm with pre-development conditions and a 10-year frequency storm under development conditions. Acceptable drainage and detention systems must be designed and approved prior to issuance of a building permit. Any such system, as required, must be constructed and approved by Public Works prior to final building inspection.

E. Evidence of a DEQ National Pollutant Discharge Elimination System (NPDES) 1200-C permit is required for all construction activities that disturb one-acre or more. Please be advised that USDA does not govern ground disturbing activities for this type of commercial use.

F. The subject property is within the unincorporated area of Marion County and will be assessed Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-10R.

#### ENGINEERING ADVISORIES

G. Per County GIS records, an unnamed natural drainageway passes through the middle of the property from southwest to northeast. Construction of improvements on the property should not block historical or naturally occurring runoff from adjacent properties. Furthermore, site grading should not impact surrounding properties, roads, or drainage ways in a negative manner.

H. It is the responsibility of the Applicant to preserve and protect the current Pavement Condition Index (or PCI) rating and the structural integrity of adjacent county roads to the satisfaction of Marion County Public Works during transport of materials and construction activities. Failure to preserve and protect the road may result in the applicant being responsible for replacing or reconstructing the damaged road at his/her own expense.

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

Marion County Building Inspection Onsite Wastewater Specialist commented that site evaluation would be required to establish septic system(s).

Turner Fire District (TFD) submitted two comments:

*Amber Cross, Division Chief- Fire Marshal:*

Turner Fire District is concerned about this potential project located at 8710 Parrish Gap Rd SE in Turner. It is important to the Fire District that all aspects from the initial project proposal to construction, access and water supply be carefully reviewed and that all fire and life safety features and ordinances are adhered to.

This potential project will increase the amount of traffic near the intersection of Parrish Gap Rd and Delaney Rd. This intersection has been very unforgiving over the years with the narrow and curved roads in that area. We are very concerned for people that will be traveling Parrish Gap Rd.

It is important to Turner Fire District that we stay actively involved with this potential project.

*Jon Remy Jr., TFD Chief:*

If appropriate, please associate this email with our previous TFD comments related to Conditional Use Application 19-024. In the days since receiving notification of the application, TFD has begun research on what is involved in providing fire protection to such facilities. As we indicated in our previous comment, we have significant concerns about protecting such large structures housing such processes. Our initial comment was designed to issue a very strong warning about fire protection while acknowledging that our detailed, formal opinion could come only after we have received careful plans for proposed structures and detailed descriptions of the activities associated with the proposed buildings. Obviously, those are not currently in our possession and while that is understandable, it is concerning.

I have become aware that there may be debate about the classification of the construction often associated with similar projects. As you know, that building-use (occupancy) classification drives much of the conversation about appropriate fire protection and the requirements for fire sprinklers, stored water, etc. The TFD assumes that Marion County will classify the main structure as an 'F' occupancy which would trigger conversation about fire sprinklers, etc. I have come to understand that there may be disagreement (varied opinions) between agencies and authorities on how to classify these very large manufacturing facilities that are related to agriculture and constructed in rural areas (and on roads) that do not anticipate such construction.

Can you assure me that Marion County will understand these issues and bring them to conclusion before permitting the conditional use? I know it is obvious to you that controversial fire protection issues must be fully addressed before construction is allowed and I appreciate the opportunity to participate in the process. It is also obvious to you that the Marion County Sheriff's Office and the TFD have responded to a significant number of catastrophic motor vehicle crashes in that area and before the TFD can support such a project, we would need a full understanding of the plan for making nearby roads and intersections safe and navigable not only for the pedestrians headed to school bus stops and agricultural traffic, but for TFD engines, tenders, rescues and ambulances.



Again, please assure me that these issues will be fully understood and mitigated as this process continues. I am sure you understand my concern.

Cascade School District commented:

My name is Darin Drill and I am the Superintendent of Cascade School District located in south Marion County. One of the elementary schools in my district is Cloverdale Elementary School, located at 9666 Parrish Gap Road, SE, Turner, Oregon 97392. This elementary school is located very close to the property in question for this application for a conditional use to establish a hemp processing facility on this property. Cascade School District is opposed to this conditional use due to the safety of its students, staff, and parents who travel Parrish Gap Road every school day to drop off and pick up their school age children.

No less than three school buses travel Parrish Gap Road every school day, both in the morning and in the afternoon, for drop off and pick up of the young students who attend Cloverdale Elementary School. Further, students, staff and parents of Turner Elementary school, Cascade Junior and Cascade Senior High School use Parrish Gap Road on a daily basis to get to their respective schools within the Cascade School District. Within the applicant's statement, under section C, "Commercial Activities In Conjunction With Farm Use," the Finding in #2, states that hemp farmers in the nearby cities of Gervais, Woodburn, and St. Paul will be using this processing facility. This means that on a daily basis, during the same times as the drop off and pick up of elementary school age students, middle school students, and high school students, these large trucks carrying hemp will be on Parrish Gap Road going to and from this processing plant. That is a tragic accident just waiting to happen that will involve young children being transported by school bus, or by parents' vehicles. Parrish Gap Road is narrow with many curves along the way. In the exact spot that this processing plant is being proposed to be placed, there is a rise in the road with limited visibility from one direction and a fairly sharp curve from the other direction. Many traffic accidents have occurred on this road and in the same area over many years. Put simply, there is no safe access point on this property for large trucks to enter and exit with school buses and other vehicles on this country road on a regular basis. By allowing this permit to go through Marion County is approving a very high likelihood that a large truck and a school bus or parents with children in their own vehicles will collide with tragic consequences. Further, if the processing plant is successful, it seems logical that this facility will also cater to hemp farmers south of this facility which means that large delivery trucks could end up driving right in front of Cloverdale Elementary School on a very regular basis coming from the southern part of the Willamette Valley. That would be an even more dangerous situation for our young students, staff, and parents.

A facility of this size and magnitude belongs in an industrial park, not near an elementary school where large processing trucks and school buses will share a small country road without a good place to exit or enter. Please deny this application for use on this property.

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

## V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 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 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.

### MCC CHAPTER 17.119

2. Under MCC 17.119.020, an application for a conditional use may be filed only by the following:
  - A. The owner of the property that is the subject of the application;
  - B. The purchaser of the property that is subject to the application when a duly executed written contract or earnest-money agreement, or copy thereof, is submitted with the application;
  - C. A lessee in possession of the property subject to the application who submits written consent of the owner to make the application;
  - D. The appropriate local government or state agency when the application is for a public works project;
  - E. A governmental body that has initiated condemnation proceedings on the property that is subject to the application, but has not yet gained title; or
  - F. A co-tenant if the property that is the subject of the application is owned by tenants in common.

Filed is not defined in MCC title 17; it is sometimes treated as equivalent to MCC 17.119.025. MCC 17.119.020 is similar to, but different from, MCC 17.119.025, regarding required signatures for an application. This case is different from the more common situation where the applicant and the property owner are the same. According to the application, Jupiter Pharma, Inc., an Oregon corporation proposed constructing a facility to process industrial hemp. It was clarified in an August 13, 2019 email by applicant’s representative, that the applicant is Jupiter Pharma, LLC, a Delaware limited liability company. Bell Trust is not the applicant and did not “file” this application. Applicant Jupiter Pharma, LLC did not provide proof by documentation or testimony that it satisfies any of the other requirements for filing an application. This section does not have a provision similar to MCC 17.119.025(B) that allows discretion in determining whether the application was

properly signed. This application was not validly filed, and the hearings officer has no authority to find otherwise. **MCC 17.119.020 is not satisfied. Without a valid filing, this application must be dismissed.**

**Should this application be heard on any appeal, the hearings officer provides a cursory, advisory conditional use evaluation for BOC consideration.**

3. Under MCC 17.119.025:
  - A. Applications shall include the following signatures:
    1. Signatures of all owners of the subject property;
    2. The signatures of the purchasers of the property under a duly executed, recorded, written contract of sale or earnest-money agreement;
    3. The signatures of the lessee in possession of the property with the written consent of all the owners; or
    4. The signatures of the agents of those identified in MCC 17.119.020(A), (B), or (C) when authorized in writing by those with the interests described in MCC 17.119.020(B) or (C), and all the owners of the property;
    5. The signature of an authorized agent of a public agency or utility holding an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owners; or
    6. The signature of co-tenants owning at least a one-half undivided interest in the property, when the property is owned by tenants in common; provided, that the signing co-tenant provides current addresses for all co-tenants who have not signed the application so the planning division can give them notice of the decision.
  - B. Prima Facie Proof of Ownership. When any person signs as the owner of property or as an officer of a public or private corporation owning the property, or as an attorney in fact or agent of any owner, or when any person states that he or she is buying the property under contract, the director, planning commission, hearings officer and the board may accept these statements to be true, unless the contrary be proved, and except where otherwise in this title more definite and complete proof is required. Nothing herein shall prevent the director, planning commission, hearings officer or board from demanding proof that the signer is the owner, officer, attorney in fact, or agent.

A deed recorded at reel 1749, page 301 of the Marion County deed records shows the subject property was conveyed to Ronald W. Bell and Rosemary G. Bell, Trustees of the Ron and Rosemary Bell Trust dated February 9, []. Rosemary G. Bell as trustee signed the application. Although no death certificate is in the record, several participants attested under oath to Ronald W. Bell's death. No trust documents are in the record showing the scope of the trustee's powers, however, the BOC could find, for the purpose of the application, that it is more likely than not that Ms. Bell, as trustee, has control over trust property and the power to sign the subject application. But, the trust is not shown as a revocable living trust, a form of trust where the trustee retains the power to revoke or alter the trust. Without a showing that Ms. Bell retains power to control all aspects of the trust, the hearings officer

recommends applicant provide documentary or testimonial evidence clearly showing Ms. Bell's authority to sign the application.

4. 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.
5. Under MCC 17.119.100, the Planning Director has the power to forward a conditional use permit application to the hearings officer for the initial decision. In such case, the reviewing body shall conduct a public hearing on the application pursuant to MCC 17.119.150. The hearings officer could hold a hearing and determine this matter. As noted above, the hearings officer found the subject application was invalidly filed, removing hearings officer authority to approve this application. **The hearings officer lacks jurisdiction in this matter. MCC 17.119.070(A) is not met.**
6. 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 criteria are met, the proposed use would be in harmony with the purpose and intent of the zone. **MCC 17.136 criteria are discussed below and are not met.**

7. The conditional use application is dismissed. MCC 17.119.070(C) is not applicable.

#### MCC CHAPTER 17.136

##### MCC 17.136.060(A)

8. 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.
9. *Farm and forest practices.* MCC 17.136.060(A)(1) is based on ORS 215.296. In *Stop the Dump Coal. v. Yamhill County*, 364 Or 432, 435 (2019), the Oregon Supreme Court interpreted and applied the ORS 215.296 farm impacts test for the first time. The court stated:

[Petitioners] contend that the text of ORS 215.296 indicates that the farm impacts test requires (1) the applicant to properly identify the surrounding lands, the farms on those lands, the accepted farm practices on each farm, and the impacts of the proposed nonfarm use on each farm practice; (2) the local government to determine whether the proposed nonfarm use will force a "significant" change to, or cost increase in, an accepted farm practice, as that term is ordinarily used; and (3) if there is a significant change, the local government to determine whether the applicant has demonstrated that, with conditions of approval imposed pursuant to subsection (2) of the statute, the nonfarm use meets the test...[W]e agree with petitioners that the legislature intended the farm impacts test to apply on a farm-by-farm and farm practice-by-farm practice basis and intended to use the ordinary meaning of "significant" and "significantly" in ORS 215.296(1), not a specialized meaning tied to the supply of agricultural land, supply of food, or farm profitability. (*See id.* at 444-445)

Applicant does not identify the surrounding lands, farms, or accepted farm practices on each farm, nor explain potential impacts of the proposed nonfarm use on each farm practice. Instead applicant states, "[b]ecause the use will be in conjunction with farm use, the use will not have a negative impact on nearby lands devoted to farm use." The application then mentions aspects of its use it claims will prevent harm to farm uses and practices but, again, provided no information specific to nearby farm uses or practices or explanation of why its practices will prevent harm to farm uses and practices. Applicant acknowledged at hearing that evaluation under *Stop the Dump* is required, and agreed to supply an evaluation during the open record period. Applicant provided no additional evidence, analysis, argument or anything else during the open record period. Applicant has not met the burden of proving that the proposed 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. MCC 17.136.060(A)(1) is not met.

10. *Adequate fire protection and other rural services.* For this criterion, the application states:

The Turner Fire District serves the parcel and all other needed services are currently available to the site.

Applicant did not indicate what TFD services might be needed for the proposal, nor explain why TFD services are adequate. TFD provided fairly extensive written comments for the record as set forth above, and excerpted here:

[W]e have significant concerns about protecting such large structures housing such processes. Our initial comment was designed to issue a very strong warning about fire protection while acknowledging that our detailed, formal opinion could come only after we have received careful plans for proposed structures and detailed descriptions of the activities associated with the proposed buildings.

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\*

TFD have responded to a significant number of catastrophic motor vehicle crashes in that area and before the TFD can support such a project, we would need a full understanding of the plan for making nearby roads and intersections safe and navigable not only for the pedestrians headed to school bus stops and agricultural traffic, but for TFD engines, tenders, rescues and ambulances.

Chief Remy also provided testimony at hearing, noting that it is not possible to adequately evaluate fire needs of the proposed use without greater detail from applicant, and without agreement by authorities on what building code classification will apply to the facility.

TFD has major fire and life safety concerns about lack of information on the proposed facility and potential mitigation measures for the proposed use. Roadway safety is a major concern. There was question at hearing about whether roadways and access to roadways are rural services. The hearings officer has long considered transportation as a service examined under this criterion. Transportation is considered under goal 11, Public Facilities and Services, and seems analogous to water and sewer services, where driveways, like sewer and water hookups, provide access to the public services stream. **Traffic safety and property access are not adequately addressed under this criterion, especially as they relate to fire and life safety concerns.**

Applicant provides no detail on the volume of water needed for the operation. At least one well is on the subject property. The property is in a groundwater limited area (GWLA). Opponents point out that, because the property is in an Oregon GWLA, wells on the property may be available for the proposed use under Oregon Water Resources Division (OWRD) laws and regulations. **Applicant needs to address whether OWRD laws prevent applicant from securing an appropriate water source for the use, and if an alternate water source may be available.**

A dwelling is on the property, so utilities, such as electric and telephone service, are likely available, but, it was suggested the use will require three-phase electricity, which is not available in the area. In the follow up letter, applicant stated that concern about inadequate electric power, "is irrelevant to the Application because it does not address relevant approval

criteria. The hearings officer believes the question of adequate power supply is directly relevant under this criterion and applicant did not provide proof of adequacy.

Applicant said some processes would require natural gas, but people in the neighborhood noted that natural gas is not available in the area. **Applicant did not provide information on other gas sources, such as propane, that might be used and what impacts might result.**

On-site septic services are not adequately addressed; there is no estimate of wastewater disposal needs in the record, and no showing that adequate wastewater disposal can feasibly be provided. The site is wet and contains a drainageway which may complicate on-site wastewater disposal. **Drainage plans were not provided, and it cannot be determined whether adequate stormwater retention/detention can be achieved.**

**MCC 17.136.060(A)(2) is not met.**

11. *Significant adverse impact.* Applicant's response to this criterion:

The Property is not within a wildlife habitat area, groundwater limited area, floodplain or geologically hazardous area. There are no potential water impounds, identified wetlands, or significant mineral and aggregate sites identified by the Comprehensive Plan in the area. The water needs at the Processing Facility will be far less than nurseries or dairy uses existing on surrounding properties. Water use will be limited to employee use of restrooms and cleaning equipment. Lastly the Processing Facility will not store any "Hazardous Materials." No storage or application of farm chemicals, other than those used in conjunction with farming of crops, is proposed. The Processing Facility will not sell farm chemicals. All operations and storage materials will be within the structures or in the direct vicinity.

Applicant is correct that the subject property is not within an MCCC-identified wildlife habitat, floodplain, geologically hazardous, or wildlife habitat area, and there are no MCCC-identified potential water impounds or identified wetlands on the site. But, applicant is incorrect about the groundwater limited area; the property is within the South Salem Hills groundwater limited area (OAR 690-502-0200), and must follow strict state law requirements for well use. Applicant did not prove it is feasible to provide wastewater disposal adequate to protect ground water from contamination. Off-site water use is irrelevant. Information is needed on what items are on the site, rather than what is not on the site. **Applicant has not shown it is feasible to meet groundwater protection standards.**

The subject property is wet and a drainage runs across the site in a north-south direction between Battle Creek and Rogers Creek, two off-property sensitive headwaters (MCCC fish and wildlife habitat map). MCPW commented on permitting and other requirements to help protect the site from erosive practices and control stormwater detention and disposal. Applicant stated the site plan was redesigned to stay out of the drainageway, but opponents disagree and provided illustrations showing how they say portions of the use will be within the drainage. **Applicant needs to address the site plan/drainageway issue.**



The filter cited by applicant for regulating air emissions was challenged as not fine enough for the size of particles that would be emitted during the extraction process. Although applicant agreed to conform to DEQ air quality permitting as a condition of approval, **applicant must show it is feasible to meet permitting requirements.**

**Lack of significant adverse impact on groundwater, soil and slope stability, and water and air quality has not been proven. MCC 17.136.060(A)(3) is not met.**

12. *Noise.* For this criterion, the application states:

The Processing Facility is not expected to generate vibration perceptible beyond the property lines, other than minimal vibrations caused by delivery trucks. Additional minimal vibration may be caused from the temporary construction work for the Processing Facility and storage structures, but not above what is generally perceived for such buildings.

And in its follow up letter applicant states:

The processing facility will be located in a building that will mitigate noise created by the processing operations. The noise generated by the facility will not be perceptible beyond what is common for other farming uses in the surrounding area.

Applicant is not proposing a farm use and the relationship of noise to "other farming uses" is not relevant. Applicant does not describe processing machinery or discuss noise from back up beepers on trucks, frontend loaders or other on-site equipment, and does not indicate whether building doors will be open during operation. At hearing, applicant stated its intent to submit specifications for equipment during the open record period so sound generation could be evaluated, but applicant submitted nothing during the open record period. **Noise was not adequately addressed. MCC 17.136.060(A)(4) is not be met.**

13. *Water impounds/mineral and aggregate sites.* No MCCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is met.

MCC 17.136.060(D)

14. The following criteria specifically apply to commercial activities in conjunction with farm use:

- (1) The commercial activity must be primarily a customer or supplier of farm uses.
- (2) The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.
- (3) The agricultural and commercial activities must occur together in the local community.

- (4) The products and services provided must be essential to the practice of agriculture.
15. The sum of applicant's argument on these criteria state:

The use will be used exclusively for extraction of hemp biomass from Oregon Department of Agriculture registered growers.

The use allows local industrial hemp growers the ability to process their crop into a form that be more easily stored and processed, which is an essential service to hemp farmers in the nearby cities of Gervais, Woodburn, and St. Paul.

The commercial activity will occur at the Property. The hemp will be grown in Marion County, Oregon. The proximity of these uses will result in lower transportation costs for many nearby farmers.

It is essential that industrial hemp biomass is extracted before it can be processed into commercial products. This extraction process is necessary for long-term storage and preservation of quality.

These responses indicate applicant presumes the local community and local agricultural community is Marion County. The application states the facility will, "process, store and dry hemp grown in Marion County and the State of Oregon." **Applicant needs to clarify the area the processing facility will serve and why it constitutes the local community and local agricultural community to properly address these criteria.**

#### VI. Order

It is hereby found that Jupiter Pharma, LLC had no authority to file the subject conditional use application. Therefore, the conditional use application is **DISMISSED**.

#### 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 11 day of December 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 26<sup>th</sup> day of November 2019.



Ann M. Gasser  
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

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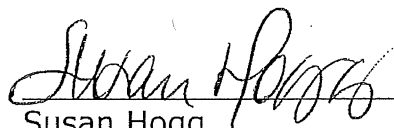
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by mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes, addressed as noted above, and deposited in the United States mail at Salem, Oregon, on the 26<sup>th</sup> day of November 2019, and that the postage thereon was prepaid.



Susan Hogg  
Secretary to Hearings Officer