



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: December 14, 2022

Department: Public Works Agenda Planning Date: December 8, 2022 Time required: 10 min

Audio/Visual aids: None

Contact: Lindsey King Phone: 503-566-4162

Department Head Signature: for Brandon Rich

TITLE: Continued public hearing to consider Hearings Officer recommendation for Conditional Use (CU) Case 20-044/Jeff and Heidi Jones, Seasons at Red Oaks Farm.

Issue, Description & Background: Jeff and Heidi Jones of Seasons at Red Oaks Farm, submitted an application for a Conditional Use Permit to operate a commercial use in conjunction with farm use on a 74.5-acre parcel in an Exclusive Farm Use (EFU) zone located at 21465 Arbor Grove Road, St. Paul. The hearings officer conducted a public hearing for the application on April 29, 2021, and issued a decision on June 21, 2021, denying the request. This decision was appealed to the Board. The Board then held a public hearing on July 28, 2021, continued the hearing until August 11, 2021, at which time they granted approval of the application. The case was then appealed to the Land Use Board of Appeals (LUBA), which issued a remand of the decision on April 21, 2022. On September 22, 2022, the applicant submitted a reconsideration request in response to the LUBA remand with a modified proposal. The Board remanded the case back to the Hearings Officer for a recommendation. The Hearings Officer held a public hearing on October 20, 2022 and issued a recommendation on November 17, 2022. The Board must now hold its hearing and make a decision on the remand. Due to the 120-day limit from LUBA, the Board must make a decision today. There can be no open record period because of the time limit. The Board continued the hearing to receive additional evidence and testimony on the customer or supplier aspect of commercial activity.

Financial Impacts: None

Impacts to Department & External Agencies: None

Options for Consideration: 1. Close the public hearing and approve the request. 2. Close the public hearing and modify the request. 3. Close the public hearing and deny the request.

Recommendation: Staff recommends that the Board approve, modify or deny the request based on testimony it receives at its hearing.

List of attachments: None



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Presenter:

Lindsey King

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

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BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of)	Case No. CU 20-044
)	Clerk's File No. 5820
SEASONS AT RED OAK FARM)	
(Jeff and Heidi Jones))	CONDITIONAL USE

RECOMMENDATION TO THE BOARD ON REMAND

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Seasons at Red Oak Farm LLC for a conditional use permit to establish an educational farm experience program as a commercial activity in conjunction with farm use on a 74.5-acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 21465 Arbor Grove Road, NE, St. Paul (T4S, R2W, Section 14, Tax Lots 100, 200, and 300).

On September 22, 2022, pursuant to ORS 215.435 and opinion from the Oregon Land Use Board of Appeals (LUBA No. 2021-089), Applicant requested that the Board of Commissioners commence the remand proceeding in this case.

Applicant submitted a remand package, including purchase orders for the crops grown on the subject property and additional evidence to address the issues with the findings raised by LUBA. Staff asked the Board to refer the matter to the Hearings Officer for a hearing and recommendation to the Board.

II. Procedural Background

On August 11, 2021, the Marion County Board of Commissioners approved Applicant's application for a condition use permit to establish an educational farm experience program as a commercial activity subject to conditions that the Board would develop. On September 7, 2021, the Board of Commissioners approved the written decision.

The Oregon Department of Land Conservation and Development ("DCLD") and the Friends of Marion County ("FMC") then appealed the Board's decision to the Oregon Land Use Board of Appeals ("LUBA").

The county delivered the record of the county's proceedings to the LUBA. The parties to the appeal subsequently discovered that the record delivered by the county to LUBA was missing several exhibits to Applicant's application materials, including Applicant's inventory of local farming practices.

Applicant was unaware that there was any issue with the farm inventory because no party had raised any issue about the inventory during the local proceedings and no one had ever

informed Applicant of any information missing from Applicant's application. Applicant has submitted updated farm inventory (see below) and the Hearings Officer recommends its inclusion in the record.

In *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994), LUBA explained that “even if a commercial activity primarily sells to farm uses, that may not be sufficient to allow the commercial activity to qualify as a commercial activity in conjunction with farm use.”

The LUBA opinion (LUBA No. 2021-089) held that the fact that the program is not a typical type of commercial activity in conjunction with farm use is not dispositive. However, the opinion held that the County’s findings were not adequate to support a finding of commercial activity in conjunction with farm use. However, despite this support of the County’s reasoning, LUBA stated that the “major flaw in the county’s reasoning is that there is no evidence that the agricultural entertainment and educational experience that the program provides will produce motivated and qualified farm workers.” *Id.* at 30-31.

The audio transcript was included in the record in the Applicant’s October 19, 2022 letter to the Hearings Officer. The transcript evidenced the Board’s discussion of the remand and provided additional context into the formation of the findings.

III. 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 17.119 and 17.136.

IV. Public Hearing

A public hearing was held on October 20, 2022 to receive testimony for recommendation to the Board on an application to establish a farm experience program for youth and families as a commercial activity in conjunction with farm use on a 74.5-acre property in an EFU zone. The Planning Division file was made part of the record, and included materials submitted by the Applicant in support of the request. The materials included:

Exhibit A: Remand narrative

Exhibit B: LUBA No. 2021-088/089 opinion

Exhibit C: Applicant's August 18, 2021 proposed findings and related correspondence

Exhibit D: County's September 7, 2021 Order No. 21-084 and adopted findings

Exhibit E: Lease agreements with Eric Kirsch Enterprises, Inc.

Exhibit F: Supplemental farm income evidence

Exhibit G: Surrounding lands farm practices inventory (updated from 2020 version omitted from LUBA record by county)

Exhibit H: 2020 application materials omitted from LUBA record by county

Applicant requested that the County incorporate the record of the prior local proceedings in this case, as compiled and paginated by the county for LUBA, into the record of this remand proceeding. *Del Rio Vineyards v. Jackson County*, LUBA No. 2015-104 (2016), establishes that an applicant may rely on the prior local record in a remand proceeding, and the Hearings Officer recommends that the prior local proceeding be incorporated.

The following persons appeared and provided testimony on the application:

- | | | |
|----|-----------------|-------------------------------------|
| 1. | Lindsey King | Planning Division |
| 2. | Michael Gelardi | Attorney for Applicant |
| 3. | Roger Kaye | Friends of Marion County (Opponent) |

No objections were raised to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at hearing (notwithstanding FMC's objection to the inclusion of inventory in the remand package discussed below).

Applicant's remand package included, among other things, purchase orders for crops grown on the subject property (the "Property") and an explanation and proposed resolution of the "findings issues" raised by LUBA.

At the hearing, Staff requested denial of the permit because the purchase orders submitted by Applicant did not clearly establish that the crops in the purchase orders were actually grown on the property. Because this concern could not be addressed prior to the hearing, Applicant requested an open record period to respond to the argument raised by Friends of Marion County. A 21-day (7/7/7) open record period followed the hearing.

On October 27, 2022, Applicant submitted materials during the open record period including two exhibits:

Exhibit 1: 10/25/22 Letter from Eric Kirsch in response to Staff and Friends of Marion County remand hearing testimony

Exhibit 2: Email correspondence re Kirsch crops on Red Oak Farm, including 9/7/22 Kirsch summary of 2020 and 2021 purchase orders, 9/9/22 transmission of 2022 purchase order, and 10/27/22 revised summary of 2020-2022 purchase orders

On November 3, 2022, Friends of Marion County presented information during the open record period. The submission challenged compliance with Applicant's requirement for a commercial activity in conjunction with farm use. FMC's submission stated that Mr. Kirsch's letter and invoices demonstrate that his farming operations do not depend on and are not facilitated, improved, or increased because of the applicant's proposed non-farm use, and that

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Seasons at Red Oak Farm

(Jeff and Heidi Jones)

Mr. Kirsch's letter also fails to demonstrate that the applicant's proposal meets the criteria in MCC 17.136.060(D).

On November 10, 2022, Applicant submitted its final written argument and proposed findings, and included a summary of the remand process. The Applicant's final submission requested further proceedings before the Board.

V. Executive Summary

The Applicant requests a Conditional Use Permit for commercial activity to establish a farm experience program in conjunction with farm use on a 74.5-acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 21465 Arbor Grove Road, NE, St. Paul (T4S, R2W, Section 14, Tax Lots 100, 200, and 300).

The Hearings Officer recommends that the Board adopt enhanced findings set forth herein with respect to the subject property being in farm use. Applicant has provided substantial evidence that the field crops grown by Eric Kirsch Enterprises, Inc. were grown for the primary purpose of obtaining a profit from their harvest and sale.

The Hearings Officer recommends that the Board allow the Applicant to respond to FMC's request for more evidence regarding the farming operation of Eric Kirsch Enterprises, Inc.

The Hearings Officer also recommends that the Board allow the Applicant to provide additional evidence or information to support a determination that the commercial activity is primarily a customer or supplier of farm use to present at a subsequent Board hearing (e.g. evidence supporting a direct connection to support that the Program addresses a farm use demand). As the record stands (and under the LUBA decision), there is insufficient evidentiary support for the conclusion that the Program provides "products and services" that are "essential to the practice of agriculture." Applicant did not provide additional testimony or evidence sufficient to meet the criteria in its remand package.

LUBA stated that it understood the county "to have concluded that the program is a supplier of farm uses because the program could produce future agricultural workers" but found "the connection between participating in the Program and a career in agriculture too remote and speculative." (LUBA No. 2021-089 at 31).

If the Applicant is able to provide additional evidence to support adequate findings of fact supported by substantial evidence that the Program is a supplier of farm uses (i.e. that the Program will result in the supply of agricultural workers), the Hearings Officer recommends approval of the application. The Applicant should establish a direct connection between the Program's activities and a future career in agriculture. The LUBA opinion instructs that the admirable goals consistent with the preservation of agriculture and agricultural work and the hope that the Program will inspire a career path in agriculture are insufficient to meet the criteria of MCC 17.136.060(D)(1).

VI. Basis for Hearings Officer's Recommendation

Applicant argues that it has demonstrated compliance with all criteria that are relevant to LUBA's remand. (Applicant's Remand Submittal, Exhibit A, Page 4, Page 7 of 114)

Based on the opinion from LUBA, the Applicants have not satisfied all relevant criteria on remand.

The findings of the Board include the following: Applicants posit that the Program is a supplier of farm uses because the purpose of the Program is to help secure the long-term supply of local agricultural workers. It is the hope and belief that the Program will spark an interest in an agricultural career in children visiting from outside the immediate area. There is a basis to determine that the Program will, in fact, secure the long-term supply of agricultural workers. The commercial activity being proposed will include sales of U-pick crops and nursery stock from the property. The proposed commercial activity is primarily (both in its focus and revenue generation) a farm educational program for families and children, that promotes farming and farm related practices. This creates both a customer and supplier of farm use by educating potential future farmers. This criterion is met."

LUBA agreed that the fact that the program is not a typical type of commercial activity in conjunction with farm use is not dispositive. However, LUBA determined that the "speculative and remote connection between the program and the production of agricultural workers does not support a conclusion that the program provides "products and services" that are "essential to the practice of agriculture." (LUBA opinion at Page 23).

The Hearings Officer agrees with the findings of the Board but does not agree that the findings are sufficient to withstand LUBA's analysis as stated in the LUBA No. 2021-089 opinion. The Applicant did not supply additional evidence or testimony to support the connection between the Program and the supply of agricultural workers as required by the LUBA opinion.

LUBA agreed that farm workers are essential to the practice of agriculture, but stated that: "There is no evidence that the agricultural entertainment and the educational experience will produce motivated and qualified farm workers." The opinion further stated "there is no direct connection between the program and a supply of agricultural workers."

Based on the record before the Board and the opinion from LUBA, the Applicant has not satisfied all relevant approval criteria to the standards set forth in the LUBA opinion, specifically that the use complies with MCC 17.136.060(D).

For this reason, the Hearings Officer recommends that the Board of Commissioners allow the Applicant to produce written or oral evidence to support additional findings establishing the Program as primarily a customer or supplier of farm use and the establishing the connection between the Program and a supply of agricultural workers.

VII. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues and recommends adoption by the Board of Commissioners of the following findings of fact:

1. The subject property is designated Primary Agriculture in the Marion County Comprehensive Plan. The major purpose of this designation and the correspondent Exclusive Farm Use (EFU) zone is to promote the continuation of commercial agricultural operations.
2. The property is located on the south side of McKay Road NE, at its intersection with Arbor Grove Rd. NE, located at 21465 Arbor Grove Road, NE, St. Paul (T4S, R2W, Section 14, Tax Lots 100,200, and 300). The parcel was subject of a Partition (P81-36) and is considered a legal lot for land use purposes. The property contains a single-family home and farm related buildings.

The property is a former blueberry and nursery stock farm that was neglected for years because of the prior owner's bankruptcy. Jeff and Heidi Jones, through their wholly owned company, Agritainment, Inc., purchased the property through the bankruptcy process.

3. Surrounding properties in all directions are zoned EFU and are in farm use.
4. According to the Soil Survey for Marion County Area Oregon, the subject property is comprised of 99% high-value farm soils.
5. Applicants seek to establish an educational farm experience program for youth and families as a commercial activity in conjunction with farm use in the existing structures with a proposal for a new structure. The applicants are proposing that this experience be aimed at families and children, with collaborations with local, social, and agricultural organizations, including schools, businesses, Future Farmers of America, 4-H, and Fusion Marketing. The proposal will include educational and recreational activities that highlight farm uses including U-pick activities, harvest and holiday themed activities, retail sales of local farm products, plant identification, and wildlife viewing.
6. Applicants originally stated that the primary source of income will be admission fees and that there will be no standard operating hours and those visitors will be in large groups (i.e., school buses). At the Board hearing the applicant stated the days and hours of operations and program activities are by appointment only, Tuesday-Saturday between 9:00 a.m. and 5 :00 p.m. These appointments will be limited to three groups per week, at no more than four hours at a time. These conditions of operation are found in condition 9.
7. The Marion County Planning Division requested comments on the application from various governmental agencies:

Public Works Land Development and Engineering Permits requested that the following be included in the land use decision:

ENGINEERING REQUIREMENTS

- A. Complete access work under the issued Access Permit for the separate commercial access to serve program.
- B. Transportation System Development Charges (SDCs) may be assessed for the proposed change- in-use on the prior constructed agricultural storage building for which use will reportedly be incorporated into the proposed farm experience program.

Marion County Building Inspection commented that a building permit, change of use or occupancy permit may be required.

St Paul Fire District commented that proposed development shall meet access and water supply requirements as outlined within the 2019 Oregon Fire Code.

All other contacted agencies either did not respond or stated no objection to the proposal.

VIII. Additional Findings of Fact and Conclusions of Law

1. Applicants have 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.)

Applicants must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, applicants have not met their burden and the application must be denied. If the evidence for every criterion is a hair or breath in applicants’ favor, the burden of proof is met and the application approved.

2. Under MCC 17.119 .020, a conditional use application may only be filed by certain people, including the lessee of the property subject to the application. The application was submitted by "Seasons at Red Oak Farm (Jeffery and Heidi Jones)". The application indicates that Seasons at Red Oak Farm is the lessee of the subject property. The application was filed by the appropriate persons. MCC 17.119.020 is satisfied. MCC

17.119.025 requires certain signatures to be part of an application, including the owner of the subject property.

The statutory warranty deed recorded in county records at Reel 4198, Page 461 shows Agritainment, Inc., an Oregon corporation, owns the subject property.

The Oregon Secretary of State website indicates that Jeffery Jones is the president of Agritainment, Inc. As a condition of approval, Agritainment, Inc. shall be required to sign the application, by Jeffery Jones, its president, to comply with MCC 17.119.025.

3. The application states: "Applicant Seasons at Red Oak Farm LLC ('Applicant') seeks a conditional use permit for commercial activity in conjunction with farm use pursuant to ORS 215.283(2)(a) and MCC 17.136.050(D)(2). Applicant proposes a farm experience program for children and families to learn about and enjoy local agriculture and wildlife."

ORS 215.283 provides uses permitted in exclusive farm use zones in non-marginal land counties.

ORS 215.283(2)(a) provides that commercial activities that are in conjunction with farm use, including the processing of farm crops into biofuel not permitted under ORS 215.203(2)(b)(K) or 215.255, is a nonfarm use that may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use. MCC 17.136.050(D)(2) provides uses permitted in exclusive farm use zones subject to obtaining a conditional use permit for commercial activities in conjunction with farm use, and subject to MCC 17.136.060(D), discussed below.

4. 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 nonfarm 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 nonfarm 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 related criteria are met, the proposed use will be in harmony with the purpose and intent of the zone. The criteria are discussed below.

5. In granting a conditional use, the Board shall determine any conditions necessary for the public health, safety or welfare, or to protect safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood. As conditioned, MCC I 7.1 19.070(C) would be met.

MCC 17.136.060(A)

6. Under MCC I 7.136.060(A), the following criteria apply to all conditional uses 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.

7. Farm practices. Under *Schellenberg v. Polk County*, 21 Or LUBA 425,440 (1991), a three-part analysis is required to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

LUBA also held that the county's findings were inadequate with regard to analysis of potential impacts to local farming practices under ORS 215.296 and the equivalent local standard. As described in Applicant's September remand materials, this was the result of the county omitting Applicant's farming practices inventory documents from the LUBA record.

In order to resolve this issue, Applicant's September remand package included Applicant's original 2020 farm practices inventory and an updated version of this inventory showing recent changes to local practices. FMC argued that Applicant should not be allowed to submit this evidence because Applicant "forfeited" this right by not ensuring that the county included Applicant's information in the record the county submitted to LUBA. A farm practices inventory is an essential element of any conditional use application in the EFU zone. *Schellenberg v. Polk County*, 22 Or LUBA 673, 680 (1992).

It is appropriate for Applicant to resubmit Applicant's original 2020 farming practices inventory and to submit an updated version of this inventory into the record. One of the purposes of LUBA's remand was to allow for more evidence and analysis of local farming practices and potential impacts on those practices.

The record demonstrates that Applicant conducted a farm practices inventory on surrounding lands and explained how Applicant's proposed use will not impact these farming practices. The record also includes several letters as well as oral testimony from farmers in the vicinity of the property expressing support for Applicant's application.

Neighboring farmers expressed support for Applicant and did not raise concerns about potential impacts to their farming practices.

The farm impacts test requires that the applicant submit substantial evidence and adequate findings to support the conclusion that impacts

Opponents raised general concerns to the Board in 2021 about traffic on a road in the vicinity of the property, no one argued that traffic generated by the program would impact local farming practices. One pair of opponents asserted that noise from children participating in the program would “encroach” on their “solitude” but did not claim that noise would impact any farming practices on their land or on other local farms.

Applicant addresses farming practices inventory and Applicant’s analysis of potential farm impacts. The nature of the program and the geography of the property will ensure there are no significant impacts from the program, including noise, visual impacts trespass and traffic.

Applicants have presented information about the restoration of farm uses on the property, the current farm uses on the property, and the future farm uses on the property. The surrounding properties are zoned EFU and are currently in agricultural use of various sizes, and again, the Application is supported by neighboring farmers. The primary practices in the immediate area are grass seed, hazelnuts, peaches, and a larger raspberry farm. The proposed learning experience would occur in the local community without disruption to surrounding farm operations. Applicants presented evidence at the hearing of support for the proposal in the neighboring area.

As conditioned, traffic generated by the program will be insignificant and Applicant has secured approval from county Public Works for a new access that has adequate vision clearance and ample distance from other intersections. Based on Applicant’s testimony and the supportive testimony of neighbors, the Board finds that Applicant will coordinate with surrounding lands farm and forest owners to ensure that program activities do not interfere with periodic agricultural traffic needs.

Applicants emphasize the nexus between educational experience on a farm and the intergenerational upholding of the practices of agriculture. Applicants indicated their intention to coordinate with surrounding lands, farm, and forest owners to ensure the activities do not interfere with periodic agricultural traffic needs. The testimony of adjacent neighbors also indicates that the farm experience program would not force a significant change in their accepted farm practices on surrounding lands. This use is expected to be low impact; therefore the costs incurred by neighboring farms will not be affected by the proposed activities. As conditioned, MCC 17.136.060(A)(1) will be satisfied.

8. Adequate services. Utility lines are available on the subject property. The subject property is not within a Sensitive Groundwater Overlay (SGO) zone. Applicants state that no development will occur in wetland areas or within the creek, which will maintain natural fish and wildlife habitat.

The subject property is located on the south side of McKay Road NE at the intersection with Arbor Grove Rd. NE. Applicants have not submitted a traffic impact analysis (TIA) or other documentation regarding traffic generated by the proposed use or its various

parts, but applicants noted that visitors will arrive in large groups, often on school buses. As limited and conditioned, transportation facilities will be adequate. The property is served by Marion County Sheriff's Department for public safety and Marion County Fire District #1 for fire protection. Sewage disposal is provided by private septic system and any expansion shall require additional authorization which is a condition of approval. With the noted conditions, adequate services will be provided. As conditioned, MCC 17.136.060(A)(2) will be satisfied.

9. Significant adverse impact. The property is not in an SGO zone or state groundwater limited area. The site is not in a geologic hazard or floodplain overlay zone. No MCCP identified major or peripheral big game habitat or watershed areas are on or near the subject property. An approved on-site wastewater disposal system will protect water quality and soil and slope stability. With a condition requiring septic system approval, MCC 136.060(A)(3) will be satisfied.
10. Noise. Applicants state that they will follow all state and local noise standards. MCC 136.060(A)(4) will be satisfied.
11. Water impounds/mineral and aggregate sites. No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is satisfied.

MCC 17.136.060(D)

12. Under MCC 17.136.060(D), commercial activities in conjunction with farm use are subject to the following criteria:
 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.
13. MCC 17.136.060(D) implements ORS 215.283(2)(a), and whether the proposed use is a commercial activity that is in conjunction with farm use is an issue of state law.

ORS 215.283(2)(a), in relevant part, defines farm use as "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops."

The Applicant must provide substantial evidence that the field crops were grown for the primary purpose of obtaining a profit from their harvest and sale. As instructed by LUBA, the “primary purpose” requirement is directed at the activities that are occurring on the land, not the actual motivation of the owner or the operator that conduct those activities. *Cox v. Polk County*, 39 Or LUBA 1, 7-12, *rev'd and rem'd on other grounds*, 174 Or App 332, 25 P3d 970, *rev den*, 332 Or 558 (2001).

The evidence provided by the applicant includes testimony from Jeff Jones and Eric Kirsch, Applicant’s site plan, photographs of crop production on the property, crop purchase orders, and lease agreements between Jones’ and Kirsch’s respective businesses.

Because LUBA’s decision questioned whether the Property is in commercial “farm use,” the Hearings Officer recommends that the Board adopt enhanced findings regarding the farm use of the Property and the relationship between the farm use and the Applicant’s educational farm experience program. The findings take into account evidence submitted in the original record as well as the evidence produced in the remand proceedings.

County planning staff and the Friends of Marion County (“FMC”) suggest that Applicant’s evidence is insufficient to demonstrate farm use. However, there is no evidence that the property is NOT being farmed or is being used for any purpose other than as indicated by Applicant and Mr. Kirsch. Skepticism regarding the farm use on the property by opponent insufficient to undermine Applicant’s evidence of farm use, specifically Mr. Kirsch’s testimony that the purchase orders are associated with the crops grown on the subject property and the photographs of the crops that were submitted to the record.

FMC correctly indicates that it is likely that Kirsch is farming property in addition to the subject property. However, that does not evidence that Kirsch is not farming the subject property. The crop yield data supplied by FMC suggests that Kirsch is farming other land in addition to subject property; it does not suggest that Kirsch is not farming the property. If Kirsch’s purchase orders encompass wheat and clover grown on additional land, then that is further evidence that the subject property supports a broader commercial farming enterprise.

The Applicant indicates that the proposed Program will use crops grown on the property and other nearby farms. Approximately 35 acres of the 74.5 acres of the property are suitable for field crops. Applicant has restored farm use of this acreage and this restoration has enabled farm use of the property by Kirsch Enterprises. The record demonstrates that Kirsch produced a commercial wheat crop on the property in 2020, a commercial crop of red clover seed in 2021, and a commercial wheat crop in 2022. Kirsch planted red clover in the fall of 2022 for harvest in 2023.

The decision issued by LUBA recognized that neither the amount of profit from a particular crop nor the motivation of the farm owner determine whether the land is in

“farm use.” Instead, the relevant issue is whether crops are “raised, harvested and sold for a gross profit.” LUBA No. 2021-088 at 16. Kirsch’s purchase orders and the testimony from Kirsch and Jones are substantial evidence that commercial crops are being grown and harvested on 35 acres on the property and that these crops are being sold for gross profit. The property is in farm use.

Applicant’s program will facilitate agricultural use of additional areas of the property beyond the field acres. This includes plant production in greenhouses in an area currently covered in gravel and in an additional large garden area in the central portion of the property that will be used to grow fruits, vegetables and ornamental plants for use in Applicant’s commercial activity. These activities are desirable because they promote the state’s Goal 3 objective to “maintain farmland” regardless of whether these specific activities constitute “farm use.”

Eric Kirsch Enterprises, Inc. farms the subject property with the primary purpose of obtaining a profit as supported by the lease and the purchase orders, as well as the testimony of Eric Kirsch. Exhibit E, a commercial farm lease agreement, and Mr. Jones testimony to the Board, support a commercial farming operation on the subject property. Exhibit F includes supplemental farm income evidence. Kirsch Enterprises, Inc. grew winter wheat which was harvested in 2020, and purchase orders for the crops were included in the record. The testimony of Eric Kirsch supports that the harvested crops were grown on the subject property. The subject property was farmed for the purpose of obtaining a profit, which is what is required under the code. Crop propagation, whether by the owner of the property or a commercial farm tenant, is farm use for profit.

LUBA’s decision required Applicant to do more to demonstrate that the Program will be in conjunction with farm use. FMC argues that this holding requires Applicant to show that the Program will “enhance” Kirsch’s specific farm use and that the Program does not meet this standard. FMC supports this argument with various theories, including that the Program will make too much or not enough money in relation to Kirsch’s farm use, and that Kirsch could be wrong in concluding that the Program may benefit his operation.

FMC mischaracterizes the relevant legal standard and there is no support for the proposition that Applicant must show that Kirsch’s farm use specifically is enhanced by the Program.

Applicant is not required to demonstrate any numerical relationship between the income of Applicant’s commercial activity and the income from Kirsch’s farm use. The state legislature has imposed incidental income standards for certain EFU zone uses, including wineries and farm stands, but has imposed no such income standard for commercial activity in conjunction with farm use. There was no on-site farm use on the winery property that was the subject of the *Craven* case, and the courts have not required farm use income demonstrations for properties hosting other accepted commercial activities (e.g. the hop warehouse at issue in *Earle v. McCarthy*; the farm equipment dealer at issue in *Balin v. Klamath County*).

14. Primarily a customer or supplier of farm uses. Applicants propose a learning experience for youth and families per the applicant statement. The Applicants present "three separate lines of evidence to demonstrate compliance with the county's customer/supplier standard.

The Applicant presents three positions in support of its contention that it is primarily a customer or supplier of farm use: (1) The proposed Program will use crops grown on the property and other nearby farms; (2) Specific crops grown on the property will be used in each element of the proposed Program. The Applicants also indicate that they have an affiliated nursery business, Fusion Marketing. (3) The proposed Program is a supplier of farm uses because the Program is to help secure the long-term supply of agricultural workers.

Exhibit 1 to Applicant's October 27, 2022 submission is a letter from Eric Kirsch, whose company leases farmland from Jeff Jones. Mr. Kirsch stated that the purchase orders provided are for crops planted and harvested on the subject property.

Exhibit 2 to Applicant's October 27, 2022 submission includes Mr. Kirsch's commitment to continue to lease the land and work with the Applicant to determine what crops will be planted to support the needs of the educational program for 2023. Mr. Kirsch's commitment to supporting the educational program does not establish (without further evidence) that the Program is a primarily a customer or supplier of farm uses.

The Applicant indicates that specific crops grown on the property will be used in each element of the proposed Program. This testimony is insufficient to establish that the Program is primarily a customer or supplier of farm uses within the meaning of MCC 17.136.060(D)

Applicant's program is designed to take place on a working farm. The lease agreement between Jones and Kirsch and other testimony in the record from Jones demonstrate that Applicant's program relies on Kirsch's farming activities for the educational function of the program. However, without further evidence, according to the LUBA decision, the agreement and reliance on Kirsch's farming activities are insufficient for the purposes of MCC 17.136(D)

Mr. Kirsch's letter (Exhibit 1 to October 27, 2022 submission) states the importance of teaching young people about farming in order to sustain the local agricultural community. Mr. Kirsch indicates that the Program will help people appreciate the work that farmers do, and "may help farmer to inspire and train young people to pursue agricultural-related fields." While Mr. Kirsch's sentiments are accurate and supported, the statements do not provide the "direct connection" LUBA sought to support the criteria. (LUBA opinion, Page 23).

Evidence supporting a direct connection to support that the Program addresses a farm use demand is required for compliance with the criteria.

Applicants posit that the Program is a supplier of farm uses because the purpose of the Program is to help secure the long-term supply of local agricultural workers. It is the hope and belief that the Program will spark an interest in an agricultural career in children visiting from outside the immediate area.

The commercial activity being proposed will include sales of U-pick crops and nursery stock from the property. The proposed commercial activity is primarily (both in its focus and revenue generation) a farm educational program for families and children. that promotes farming and farm related practices. However, such a Program does not in and of itself support a finding that the Program is both a customer and supplier of farm use by educating potential future farmers.

Although not binding on the hearings officer, in Marion County Conditional Use Case No. 18-007, involving an application to establish a gypsum processing facility as a commercial activity in an EFU, the Planning Director noted that “[t]he requirement that the commercial activity must be ‘primarily a customer or supplier of farm uses’ is interpreted by Marion County as a minimum of 75% of sales must be made to commercial farm operators...”

The requirement that the commercial activity must be ‘primarily a customer or supplier of farm uses’ has been interpreted by Marion County as a minimum of 75% of sales must be made to commercial farm operators. The approval of a commercial use in conjunction with farm use allows other kinds of agri-tourism-type events as long as income generated from these events is incidental. Although Applicants are not held in this case to the analysis of a minimum of 75% of sales must be made to commercial farm operators, Applicants, should establish that the Program (while not a typical type of commercial activity in conjunction with farm use) will be a supplier of farm use. Applicants posit that the Program is a supplier of farm uses because the purpose of the Program is to help secure the long-term supply of local agricultural workers.

Although it is the hope and belief that the Program will spark an interest in an agricultural career in children visiting from outside the area, there is insufficient basis to determine that the Program will, in fact, secure the long-term supply of agricultural workers.

The LUBA opinion requires that the County’s findings support by substantial evidence that the Program is primarily a customer or supplier of farm uses.

As presented, this criterion is not established by sufficient findings supported by substantial evidence to establish that the commercial activity must be primarily a customer or supplier of farm uses.

In this case, the proposed use is a farm experience for children and families to learn about and enjoy local agriculture and wildlife. The activities are aimed at families with children and include themed activities and display plants to teach children about how crops are grown. The Program does not appear to include an educational experience for

learning about agriculture (and the many facets therein) as a career. If the Program included activities that addressed farming careers, communications with individuals in the farming industries, or connected participants with farmer training programs, the connection with the Program and a career in agriculture could be considered less speculative or remote.

14. Enhance farming enterprises in local agricultural community. The Oregon Supreme Court has held that “to be ‘in conjunction with farm use,’ the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates. The agricultural and commercial activities must occur together in the local community to satisfy the statute.” *Craven v. Jackson County*, 308 Or 281, 289 (1989).

Agricultural education such as proposed by Applicant enhances local farming enterprises in accordance with the standard set forth in *Craven*. This finding is supported by the testimony of various local farmers and other agricultural professionals in the record, including Eric Kirsch, Jeff Jones, Tom Harbolt, Nicole Sharpe, Steve Catts, Ernst Nurseries and a local Future Farmers of America chapter, who have all stated that programs like the one proposed by Applicant are needed and benefit the local farming community.

There is no basis to deny Applicant’s land use permit on the grounds that the agricultural education proposed by Applicant is not sufficiently “in conjunction with” agriculture or farm use.

Based on testimony from Jones and Kirsch, the Jones’ planned commercial activity has already enhanced a local farming enterprise, because it has facilitated the restoration of farmland and farm use on the property. The record indicates that the Joneses purchased the property for the purpose of revitalizing it as a showcase for the diversity and opportunity of Willamette Valley agriculture and that Applicant’s proposed commercial activity evolved from that vision. Mr. Kirsch has testified that he would not be able to farm the property but for the Joneses’ work to restore the property.

The requirement of continued farm use of the property as a condition of Applicant’s permit makes it more likely that farm use of the property will continue. Relatedly, Applicant’s commercial activity will also add value to field crops grown on the property by utilizing these crops for educational demonstrations of farming practices, in addition to the cultivation of these crops for commercial sale. These facts align with the Supreme Court’s reasoning in *Craven*.

There is no evidence to indicate that Applicant’s program may hinder farm use of the property based on Eric Kirsch’s testimony to the contrary. Applicant’s program will also enhance other local farms by purchasing or otherwise utilizing farm crops such as local pumpkins and gourds, cider, hazelnuts and ornamental plants as described by Applicant’s application materials.

The proposed learning experience will enhance local farming enterprises by developing a market for other local farm crops. This criterion is met.

19. Occur together in the local community. The surrounding properties are zoned EFU and are currently in agricultural use of various sizes. The primary practices in the immediate area are grass seed, hazelnuts, peaches, and a larger raspberry farm. The proposed learning experience would occur in the local community without disruption to surrounding farm operations. This criterion is met.
20. Products and services essential to the practice of agriculture. The Applicants assert that Oregon courts and the state legislature have long recognized that building consumer interest and market demand for local farm crops is essential to Oregon agriculture. The Applicant argues that the c's "essential to the practice of agriculture" standard is met because the Program is designed to market local farm crops and to promote local agriculture. Applicant clearly identifies how the commercial activity provided is essential to the practice of agriculture through marketing local farm crops and promoting local agriculture.

Commercial use in conjunction with farm use is not typically associated with children and family extracurricular activities, however the proposed commercial use is designed to promote farming to youths with the intent of creating future farmers. Applicants would be receiving local farm crops and then processing and marketing the crops; here, Applicants are primarily focusing on the education of local, farm-related customers.

Applicant argues that a motivated and qualified agricultural workforce is essential to the practice of agriculture, and argues that the proposed use will inspire and train young people to pursue careers in Oregon agriculture.

Witness Tom Harbolt indicated that his livelihood is in agriculture, and he cannot find enough qualified workers who are interested in agriculture as a career. Mr. Harbolt posits that as there is less funding in education, exposure to agriculture as an educational experience will expose people at a young age to the possibility of a career in agriculture. Mr. Harbolt testified that there is a nexus between the educational experience and upholding the practice of agriculture. Mr. Harbolt also stated that he was not raised on a farm, supporting the idea that agricultural careers are not solely for those individuals raised on a farm.

Witness Nicole Sharpe testified in support of the Application. Ms. Sharpe lives adjacent to the subject property, and testified that she would have benefitted by an agri-educational experience in her farming activities and agrees that the agricultural experience for children is important for appreciation and interest in agriculture as a career.

Witness Steve Catts testified in support of the Application. Mr. Catts testified that Jeff Jones was instrumental in getting him into agriculture. Mr. Catts believes that the agricultural education experience would contribute to interest in agriculture as a career. There are limited opportunities for horticulture and mechanic programs in schools, a need for managers in the agriculture industry, and he believes that the educational program proposed by Applicant is desperately needed to bring interest in agriculture as a career.

The testimony of Mr. Harbolt, Mr. Catts, and Ms. Sharpe supports the implication that an educational experience may lead to involvement in an agricultural career. However, the testimony is insufficient to support the connection between the proposed Program and the pursuit of a career in Oregon agriculture.

The Board may permit Applicant's program under the commercial activity use as long as the Board adopts adequate findings regarding the Program's relationship to farm use.

Opponents to the proposed conditional use brought up several complaints regarding the proposed use. One opponent stated the farm's primary income should be from farm use, not admission fees. If a use is determined to be a commercial activity in conjunction with farm use, it would be able to generate income from that use on farmland under the county zoning code. Other opponents made arguments regarding safety of roadways, specifically, McKay Road access, loss of farmlands to non-farming practices, and that the proposal is not a supplier or customer of farm use.

If a use is determined to be a commercial activity in conjunction with farm use, it is a use allowed on farmland and conditions can be placed on the approval to minimize any potential conflict with surrounding uses. The hours of operation and the size of the groups visiting the property will ensure that the roadway network can support the proposed use.

The Hearings Officer previously and again finds that, although the nexus was tenuous, the Applicant's proposed program, can be considered essential to the practice of agriculture in that it promotes agriculture as a valued Oregon enterprise. To the extent that the proposed program builds consumer interest in Oregon agriculture and contributes to the inspiration of youth to pursue a career in agriculture, the criterion can be met.

The criterion can be met as the Applicant's proposed program is essential to the practice of agriculture in that it promotes agriculture as a valued Oregon enterprise, actively markets local agricultural products, and helps to train new generations of agricultural workers. The proposed program builds consumer interest in Oregon agriculture and contributes to the inspiration of youth to pursue a career in agriculture.

IX. RECOMMENDATION

The Hearings Officer recommends that the Board adopt enhanced findings set forth herein with respect to the subject property being in farm use.

The Hearings Officer recommends that the Board allow the Applicant to respond to FMC's request for more evidence regarding the farming operation of Eric Kirsch Enterprises.

The Hearings Officer recommends that the Board allow the Applicant to provide more evidence or information to support a determination that the commercial activity is primarily a customer or supplier of farm use to present at a subsequent Board hearing (e.g. evidence supporting a direct connection to between the Program and farm use demand).

Upon Applicant's submission of evidence sufficient to address the (1) farming operations of Eric Kirsch Enterprises, Inc. and to support that the Program is primarily a customer or supplier of farm use as required by the LUBA opinion, the Hearings Officer recommends the Board's approval of the application subject to the conditions provided below.

CONDITIONS: The following conditions must be met before a building permit can be obtained or the approved use established:

1. Agritainment, Inc. shall sign the application as the owner of the subject property, by Jeffrey Jones, its president.
2. The applicant shall obtain all required permits from the Marion County Building Inspection Division including any onsite sewage disposal requirements.
3. The applicants shall provide a detailed site plan for review of development standards in Marion County Zoning Code (MCZC), such as parking, access, signs and setbacks. The detailed site plan shall significantly conform to the site plan submitted with the proposal. Minor variations are permitted upon review and approval by the Planning Director.
4. The approved commercial activity is limited to the use proposed in the application, specifically the five elements of the farm experience program listed below:
 - a. "Know how they grow" activities: Educational activities that utilize display plants to teach children about how crops are grown, harvested, assessed for quality and weighed. These activities are designed for groups of typically less than 30 people and will be conducted in the central portion of the Property.
 - b. Plant identification and wildlife viewing: Guided nature walks for small groups along restored trails in the forested western portion of the Property near Champoeg Creek, as well as in a children's garden near the new workshop building and inside the workshop in the central portion of the Property.

c. U-Pick activities: Micro-harvesting activities such as sunflower seed collection for small groups of children in the central portion of the Property. These activities will allow children to be active and enjoy the outdoors while also encouraging interest in agriculture.

d. Harvest and holiday themed activities: Seasonal activities that complement the above activities, including for example com maze, cider pressing, pumpkin toss, winter wonderland hike.

e. Retail sales of farm crops: Small scale sales designed to showcase local farm products and to complement the activities above (e.g. pumpkins and gourds, cider, hazelnuts, ornamental plants)

5. In order to ensure that the commercial activity remains incidental and secondary to farm use of the property, operation of the approved commercial activity is contingent on continued farm use of the property, specifically on the portion of the property suitable for field crops as defined in the application.

6. Any light used to illuminate a parking or loading area shall be directed away from any abutting properties or public streets.

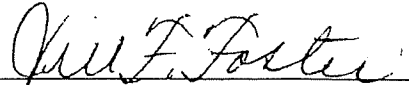
7. Any sign placed on the property shall meet the standards in Chapter 17 .191 MCC.

8. Applicant must submit proof that Applicant has provided at least 9 parking spaces that are 9' x 17' as required by MCC 17.118.050 and 17.118.070(0)(1), plus the three disabled-accessible spaces proposed by Applicant.

9. The approved commercial activity is by appointment only Tuesday-Saturday and is limited to three groups per week. Group appointments must be between the hours of 9:00 am and 5:00 pm, and each appointment is limited to no more than four hours in duration. Applicant will instruct groups to avoid McKay Road and instead reach the property from the south.

10. Failure to continuously comply with the conditions of approval may result in this approval being revoked. Any revocation may be appealed in accordance with Marion County Code Title 17.

DATED at Salem, Oregon, this 17th day of November, 2022.


Jill F. Foster
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Jeff and Heidi Jones
Seasons at Red Oak Farm
17305 NE Leander Drive
Sherwood, OR 97140

Michael Gelardi
Gelardi Law P.C.
P.O. Box 8529
Coburg, OR 97408

Steve Catts
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St. Paul, OR 97137

Tom Harbolt, President
Providence Management Group LLC
P.O. Box 2247
Hillsboro, OR 97123

Nicole Sharpe
P.O. Box 22
St. Paul, OR 97137

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

Agencies Notified:

Planning Division
(via email: planning@co.marion.or.us)
(via email: lking@co.marion.or.us)
(via email: breich@co.marion.or.us)
Code Enforcement
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(Jeff and Heidi Jones)

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DLCD

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

St. Paul Fire District:

(via email: bryan@stpaulfire.org)

Phillip Mahony (AAC Member No. 5)

4179 Mahony Road NE

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Tom Harbolt

475 Scenic Ridge Court

Redmond, OR 97756

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 17th day of November, 2022 and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer