

The record was left open to allow additional submittals by the Applicant, Opponents, or interested parties. The following submittals were received, and are included in the record:

- Open Record Submittal 1: Steve Adelman Statement with Exhibits
(Received February 5, 2025)
- Open Record Submittal 2: Applicant’s Open Record Response 1
(Received February 7, 2025)
- Open Record Submittal 3: Applicant’s Open Record Response 2
(Received February 6, 2025)
- Open Record Submittal 4: Additional Argument in Opposition to CUP 24-028
(Received February 14, 2025)
- Open Record Submittal 5: Additional Argument in Opposition to CUP 24-028
(Received February 19, 2025)
- Open Record Submittal 6: Final Submission by Applicant (Rebuttal)
(Received February 27, 2025)

IV. Executive Summary

Applicant seeks a conditional use permit to operate a mulching service as a commercial activity in conjunction with farm use on a 9.72-acre parcel in an EFU (Exclusive Farm Use) zone located at 5711 Brooklake Rd. NE, Salem, Oregon. Applicant proposes to designate his mulch production operation as a commercial activity in the EFU zone. Applicant primarily operates an off-site tree service company, and stores logs and tree debris on the Subject Property. Applicant seeks a conditional use permit to produce mulch chips as a commercial activity and to provide the mulch to nearby agricultural operations.

Marion County Planning Director approved the Application with conditions of approval, and the approval was appealed by multiple interested parties. Based on new information, Marion County Planning acknowledged after the appeal that additional information was necessary and proposed additional conditions of approval.

Appellants and Opponent Adelman Peony Gardens, LLC and Steve Adelman challenged whether the Application established that the proposed commercial activity had a sufficient connection with farm use and was essential to the practice of farming. Opponents argue that the proposed commercial activity fails the Farm Impacts Test. Opponents also argue that the proposed commercial activity is secondary to a commercial non-farm use of the property in conjunction with Applicant’s tree service company. Opponents further dispute whether an approval could be granted with a claim of ongoing violations that would not be cured by approval.

Applicant argues that the storage of logs, vehicles, and equipment is incidental to the mulching operation, and that the Applicant meets criteria to support a sufficient connection with

farm use. Applicant argues that there is sufficient evidence for Applicant to pass the Farm Impacts Test. Applicant agrees with and proposes conditions of approval.

Applicant does not provide sufficient evidence to support a determination that the commercial activity is primarily a supplier of farm uses and is essential to the practice of agriculture as required by Oregon law. While the Applicant is mindful of the concerns of his neighbors and is willing to accept conditions of approval to mitigate impacts, Applicant has not met the criteria to establish that the commercial activity would not have a significant adverse impact on nearby land uses, specifically with respect to MCC 17.136.060(A)(d) (noise associated with use).

The Application for Conditional Use for a mulching operation service as a commercial activity in conjunction with farm use is DENIED. Although providing mulch without cost upon the request of a rancher or nursery may benefit the those operations to whom the mulch is provided, there is insufficient evidence to establish that the commercial activity is a customer or supplier of farm uses and that the mulching operation is essential to agriculture.

V. Findings of Fact

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

1. The subject property is designated Primary Agriculture in the Marion County Comprehensive Plan. The major purpose of this designation and the corresponding EFU (Exclusive Farm Use) zone is to promote the continuation of commercial agricultural and forestry operations. The zoning does also allow for certain commercial activities conducted in conjunction with agriculture subject to certain conditions and criteria.
2. The property is located at 5711 Brooklake Rd. NE on the north side of Brooklake Rd. It is roughly a half mile east of the intersection of Brooklake Rd. and Hwy 99E. The property contains a dwelling, a couple accessory structures, and there is a substantial amount of tree debris and heavy machinery located on the property according 2023 aerial imagery of the property. Further review of available street imagery shows large logs stored on the property that are visible from the road. Behind a mound of dirt separating the outside of the homesite area is a farm field that encompasses the remainder of the parcel.
3. Surrounding uses are predominantly agricultural operations located on all sides except for the northern half of the west property line, which is next to residential parcels zoned Acreage Residential within the Brooks-Hopmere community. Commercial uses within Brooks-Hopmere are located half a mile down Brooklake Rd. where it intersects with Hwy 99E. Additionally, a dedicated right-of-way for 57th Ave NE (a non-county road) runs along the full extent of the western property line, but most of this right-of-way is not actively used for a roadway.
4. Soil Survey of Marion County Oregon indicates 100% of the subject property is composed of high-value farm soils.

5. Applicant is proposing to establish a mulching business as a commercial use in conjunction with agriculture on the subject property. The business operations would include the storage of woody debris to be turned into mulch, the production of the mulch on-site, and the storage of mulch.
6. Various agencies were contacted with the proposal and given an opportunity to comment.

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

Requirements:

- A. Within 30 calendar days from the date of full land use approval, obtain an Access Permit to permanently close the private driveway approach to Brooklake Road in favor of taking all access off 57th Avenue. Rationale is that the property already has two accesses from 57th Avenue, which is considered reasonable access, and furthermore, the Brooklake Road approaches measuring only 25 feet apart from each other do not meet spacing criteria for a Major Collector. Also under the Permit, widen the 57th Avenue approach with hot mix asphalt including broadening the radius flares since evidence indicates wide vehicle turns are dragging gravel onto the edge of Brooklake Road. Note: it will not be required to re-address the property to 57th Avenue.

Marion County Building commented: “No Building Inspection concerns. Permit(s) are required to be obtained prior to any development of structures and/or utilities installation on private property, if applicable.”

Marion County Septic commented: “An authorization is required if there is any proposed connection to the existing system.”

Marion County Code Enforcement commented that the application is to help resolve a code enforcement violation on the property.

Marion County No 1 Fire District provided comments with fire code requirements for the proposed commercial option. See enclosed comments.

All other commenting agencies stated no objection to the proposal.

7. Prior to the public hearing, Attorney Nicholas A. Rhoten submitted a statement in objection to the Application, which was included in the record, on behalf of Adelman Peony Gardens, LLC. Adelman Peony Gardens operates a farm directly across from the Subject Property, and noted disruptions to their farm practices resulting from Applicant’s proposed operations.
8. Prior to the hearing, Terry Beilke submitted a statement addressing his concerns that the sale of the wood chips is a minimal portion of the income for Applicant and his concerns

about the use of an easement being used as a parking lot by Applicant's employees. Mr. Beilke states that the use of the property seems to be industrial in nature and notes the possible expansion of use on EFU property.

9. Marion County Planning Department, Alex Seifer, presented the Staff Report. Mr. Seifer noted that this Application was in response to ongoing code violations. Mr. Seifer stated the specific criteria in the Marion County Code for approval of the application, and stated that the Applicant met the conditions for approval with the proposed conditions of approval.

New information received by Planning after the appeal was filed indicates that there are potential impacts to nearby farming operations, which require additional support from Applicant. The new information was related to the impact of noise on surrounding uses. Mr. Seifer indicated that the noise that should be considered is the noise of the entire operation as a whole, not just the noise related to periods of active mulching. Mr. Seifer addressed the "75-25" rule which has historically been recognized, specifically with respect to farm stand code, and examines whether at least 75% of use or revenue is dedicated to the commercial operations. In this case, Mr. Seifer indicated that 9% of the total area is used for storing logs, and 91% of the total area is used for mulching operations. In reply to the hearings officer's inquiry, Mr. Seifer stated that the area used for the storage of vehicles should be considered as part of the percentage dedicated to commercial activity, to the extent that the vehicles and equipment are used for the mulching operation, including equipment and vehicles used to move material.

10. Mark Shipman, attorney for the Applicant, requested approval of the Staff Decision, and stated that issues raised in the appeal and opposition have been addressed, and would be further addressed during an open record period.
11. Marvin Klopfenstein, Applicant, testified at the hearing. Mr. Klopfenstein testified about the operations at the Subject Property. Mr. Klopfenstein testified that his primary operation is Mountain View Tree Service, and that he does not consider the Subject Property as part of his primary operations. Mr. Klopfenstein testified that he grew up on a farm and has a understanding of the Appellants and Opponents' positions. Mr. Klopfenstein testified that material from the tree service is deposited at the Subject Property and divided out to some non-farm uses (wood), and then the mulch production operations supply farm uses in the surrounding area. Mr. Klopfenstein testified that, unlike his competitors who burn or place debris in landfills, he is committed to using the product to benefit multiple farmers. Mr. Klopfenstein testified that he benefits local farming operations by providing mulch without cost. Mr. Klopfenstein testified that the issues that have arisen with use of the Subject Property have been alleviated with the installation of a berm, dust mitigation practices, and the fact that there will not be burning on the property. Mr. Klopfenstein also addressed loading and unloading on the roadway, and concerns with the access. Mr. Klopfenstein testified that the grinding is about 40-60 hours annually, and acknowledged that there is also chainsaw noise. Mr. Klopfenstein acknowledged that the equipment and vehicles do move in and out of the site in addition to the active mulching operation.

Mr. Klopfenstein testified that there will not be storage tanks on the property, and will not be spraying on the property. With respect to visual concerns, Mr. Klopfenstein testified that the concern of the property being an “eyesore” has been addressed by a berm and planting trees. With respect to parking issues on the easement, Mr. Klopfenstein testified that there will no longer be parking by his workers in the easement, and that he is committed to being a good neighbor to his neighbors’ farming operations

12. Courtney Reed testified in opposition to the Application. Ms. Reed testified that the surrounding areas in which there are farming operations also have homes that are impacted by the noise at the Subject Property arising from the proposed conditional use. Ms. Reed testified that she is aware of the typical noise of a farming operation, including tractors and harvesters; however, the noise that is associated with the Applicant’s operations far exceeds the anticipated and typical farm noise. Ms. Reed testified that the decibel level of the grinder and the excavators is exceedingly high and precludes quiet enjoyment of her property. Ms. Reed stated that her children and family are unable to be outside during noisy operations. Ms. Reed also questioned the actual time of active grinding as vague. Ms. Reed inquired whether the “four times per year” suggestion meant four days per year or four weeks per year. Ms. Reed also addressed her concern that the noise from the operation would impact property values to the detriment of surrounding properties.
13. Roger Weddle, Appellant, testified at the hearing. Mr. Weddle has lived near the Subject Property for over thirty years. Mr. Weddle inquired about the direction that the proposed conditional use would expand on the Subject Property. Mr. Weddle stated his concern for the high value soils in the area being impacted by the dust, water, and noise created by the proposed activity that could occur about 100 feet from his property. Mr. Weddle testified that the extreme property noise rattles his windows. Mr. Weddle testified that he does not believe that the vegetative berm will not protect his family from possible disease from tree debris from diseased trees. Mr. Weddle stated that the Staff Approval did not consider the impacts on surrounding properties.
14. Nicholas Rhoten, attorney for Adelman Peony Gardens, LLC, and Steve Adelman, presented his client’s objections to the Application. Adelman Peony Gardens is located across Brooklake Road from the Subject Property. Mr. Rhoten raises four arguments: (1) The Application lacks a sufficient connection to farm uses and is not essential to the practice of farming. (2) The proposed activity is not as characterized by the Applicant and is actually a commercial, non-farm use of the property in which the mulching operation is secondary. (3) The Application fails the Farm Impacts Test. (4) The Application should be denied based upon ongoing violations that would not be cured by approval of the Application.
15. Steve Adelman testified at the hearing. Mr. Adelman, member of Adelman Peony Gardens, LLC, operates the farming operations across Brooklake Road from the Subject Property. Mr. Adelman testified that noise from the activities at the commercial operations are audible over one-half mile away. Mr. Adelman states that the noise from the Subject Property impacts nearby farming operations. Mr. Adelman also addressed negative impacts of use of accessways by Applicant’s vehicles. Mr. Adelman submitted the

photographs taken by him on the date of the hearing that were admitted as Exhibits 1 and 2. The first photograph shows an intersection and the second shows a vehicle on neighboring properties. Mr. Adelman addressed noise consideration, and the possible trespass to neighboring properties based upon Mr. Beilke's submission.

16. In addressing the "easement" described by Mr. Beilke's letter and Mr. Adelman's testimony, Marion County Planning Alex Seifer clarified that there is not an "easement" but a dedicated county right of way. There is a public right of way, but not an easement.
17. Marion County Code Enforcement Officer Chad Goffin testified at the hearing. Mr. Goffin testified that he wanted to testify after hearing testimony presented at the hearing. Mr. Goffin testified about his belief that Mr. Klopfenstein did not respond to his correspondence. Mr. Goffin testified about the events leading up to the citation issued to Applicant arising out of his use of the property which led to Applicant's seeking conditional use of the property. Mr. Goffin addressed the multiple attempts to contact Applicant about code enforcement issues regarding the property. Mr. Goffin stated that Applicant told him he would be removing the equipment from the Subject Property and would consider purchasing alternate property with zoning to allow the proposed use. Mr. Goffin testified that he did not recall any discussions with Applicant regarding a mulching business, and understood that the property was being used as a staging area for the tree service operations. Mr. Goffin has not conducted any further site visits to the Subject Property, and did not offer a statement regarding whether the Applicant was currently in compliance.
18. Marvin Klopfenstein presented testimony in rebuttal to the testimony in opposition. Mr. Klopfenstein addressed that the testimony presented addressed noise complaints prior to the time when the berm and trees were placed on the property. With respect to the northward development of the property, Mr. Klopfenstein indicated his willingness not to proceed toward Mr. Weddle's property. Mr. Klopfenstein noted that only approximately 2 acres of the property would be used for the mulching operations.

Mr. Klopfenstein stated that diseased trees are not taken to the Subject Property but rather are taken to a designated site for diseased trees. Mr. Klopfenstein stated that the farmers to whom he delivers mulch have told him that it is essential to their operations and submitted declarations to support the importance of the wood chips and mulch to their farming operations. Mr. Klopfenstein testified that the tree service operations do not occur on the property, and that the recent noise experienced by Mr. Weddle was from the excavation required to construct the berm, which will mitigate the impacts on neighboring properties.

19. Mark Shipman stated that he was not involved with the Stipulated Judgment reached with Marion County, but presently, because of the Planning Approval and compliance with the Stipulated Judgment, Applicant is in not in violation of the code.

20. Alex Seifer, Marion County Planning, stated that given the testimony and information received after the Staff Decision was appealed, Marion County Planning would be proposing additional conditions of approval if the Application were to be approved. The additional conditions of approval would include: (1) No parking or storage of vehicles in the County right of way; and (2) The hours of operation for the commercial activity should be restricted to the hours of 8:00 a.m. to 5:00 p.m. Mark Shipman indicated that such conditions of approval would be accepted by Applicant.
21. Applicant requests that the testimony of Mr. Goffin be struck from the record as prejudicial to Applicant's rights to a fair and impartial hearing, and objects to the testimony on relevance grounds. Applicant states in his February 6, 2025 submission to the record that on November 12, 2024, Applicant and Marion County Legal Counsel entered into a Stipulated Judgment to resolve the outstanding citation matter. The Stipulated Agreement is included with Applicant's first submission during the open record period. The Stipulated Judgment provides that Marion County will not cite Applicant for alleged violations on the subject property until May 12, 2025. Applicant states that Applicant is in complete compliance with the Stipulated Judgment.
22. On February 5, 2025, Steve Adelman, member of Adelman Peony Gardens, LLC, submitted a Statement in Opposition to the Conditional Use Permit. Mr. Adelman stated that he believes Applicant uses a "grinder" to destroy debris generated by nonfarm activities. Mr. Adelman argues that the grinder is extremely loud with major impacts to surrounding farms and properties. Mr. Adelman's statement, supported by Exhibits 1 and 2, argues that the noise generated by the grinder creates noise with decibels equivalent to a jet plane engine and that such noise is detrimental to nearby farming operations.
23. On behalf of Adelman Peony Gardens, LLC, Attorney Nicholas Rhoten, Matheny Law, provided additional argument dated February 12, 2025. (Open Record Submittal 4). Mr. Rhoten argues on behalf of Adelman Peony Gardens, LLC that the record fails to establish that mulch is "essential" and fails MCC 17.136.060(D)(4). Mr. Rhoten argues on Adelman's behalf that the proposed commercial activity is not primarily a customer or supplier of farm uses, and that the Application fails the Farm Impacts Test.

Adelman Peony Gardens, LLC, through attorney Mr. Rhoten, argues that there are ongoing violations that are not cured by the Staff Decision or the Stipulated Judgment. Adelman states that the permit is not yet effective, and then argues that the cited violations are arguably ongoing. Adelman argues that the Application must be denied because the "violations" cannot be cured with approval.
24. Applicant's final submission (Rebuttal) dated February 27, 2025 addressed the arguments submitted by Opponents, specifically the Farm Impacts Test, Connection to Farm Use, Incidental Uses on the Subject Property, and Compliance with Marion County Code.

VI. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving all applicable standards and criteria apply as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(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 even slightly in Applicant’s favor, the burden of proof is met and the application is approved.

2. Under MCC 17.119.100, the Planning Director has the power to decide applications for conditional uses. Under MCC 17.119.140, after the Planning Director’s action on the application, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director’s approval was dated November 8, 2024. The Notice of Decision included the Appeal Procedure and stated that anyone who disagreed with the Director’s decision may request the application be considered by a Marion County Hearings Officer. The Notice of Decision stated that all requests for reconsideration be received in the Marion County Planning Division by 5:00 p.m. on November 25, 2024.

Courtney and Gordon Reed and Beverly and Chadwick McCarroll are interested persons and appealed the Planning Director’s decision on November 25, 2024. Additional interested persons, Roger and Debby Weddle, appealed the Planning Director’s decision on November 25, 2024. The appeals were timely because the Notices of Appeal submitted on November 25, 2024, which allows for a *de novo* public hearing.

Under MCC 17.119.150, on appeal of the Planning Director’s decision, the hearings officer shall conduct a *de novo* public hearing on the decision. The hearings officer may hear and decide the matter.

3. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. A deed recorded in the county records at Reel 4491, Page 120 shows that Marvin W. Klopfenstein owns the subject property. The application was filed by appropriate persons. MCC 17.119.020 is satisfied.
4. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including all owners of the subject property. Marvin W. Klopfenstein owns the subject property and signed the application. MCC 17.119.025 is satisfied.

5. Under MCC 17.119.070, before granting a conditional use, the director, planning commission or hearings officer shall determine:
 - A. That is has the power to grant the conditional use;
 - B. That such conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
 - C. That any condition imposed is necessary for the public health, safety, or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
6. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. Commercial activities in conjunction with farm use is listed as a conditional use under MCC 17.136.050 (D)(2).

MCC 17.136.060(D)

7. In order to approve a commercial activity in conjunction with farm use the applicant must demonstrate compliance with the specific criteria listed in Chapter 17.136.060(D) of the Marion County Code (MCC). These include:

(a) The commercial activity must be primarily a customer or supplier of farm uses.

Applicant is the proprietor and operator of Mountain View Tree Service (MVTS). The Subject Property is where MVTS stores various forms of woody material from the tree services provided. The materials include both logs that are sold to mills for lumber production and smaller debris that are turned into woodchip mulch. Applicant states that the mulch is provided to local farms for various applications.

Applicant submitted supplemental information showing specific agricultural applications for mulch in connection with agricultural operations. Applicant argues that supplying farms with mulch material make Applicant a primary supplier for agricultural needs.

Adelman Peony Gardens, LLC (“Adelman”) disputes Applicant’s characterization of the Applicant’s commercial activity and argues that the real use of the property is for the storage and operation of MVTS’s business equipment and is wholly unrelated to any farm use. Adelman argues that the mulching operations, to the extent they are connected to farm use, are secondary to the commercial use.

Opponents argue that the “commercial activity” proposed is in fact an equipment and debris storage/disposal site for the tree trimming business, Mountain View Tree Services (“MVTS”), which does not exclusively or primarily supply to farm uses. Opponents argue that the mulch generated onsite is not sold. It is merely provided to some farmers

as a courtesy when it is delivered. and no consideration is paid. The mulch is created using trees/wood by-products/and other debris generated from Applicant's tree service business. Applicant only uses wood debris than cannot be otherwise sold to lumber mill.

Opponents argue that the commercial activity is not a customer or supplier of farm uses because vehicles and equipment come and go from subject property virtually every day for Applicant's business (MVTs), but the actual mulching only occurs approximately four times per year. Opponents posit that the mulching operation would not exist but for the nonfarm general commercial operations of MVTs and the need to dispose of tree debris (albeit responsible and beneficial use of the tree debris).

The statutory phrase "[c]ommercial activities that are in conjunction with farm use" is not defined and is determined on a case-by-case and fact specific basis. *Friends of Marion County v. Marion County* (Jones/Agritainment), LUBA No. 2021-088/89 at 17-19 (2022).

The inquiry is whether there is the "requisite connection between [the] commercial activity and a farm use." *Id* at 18. To that end, the commercial activity must "enhance the farming enterprises of the local agricultural community" given the goals of Oregon land use law. *Craven v. Jackson County* (Craven II), 308 Or. 281, 289 (1989).

The above inquiry turns on (1) whether the commercial operator is "exclusively or primarily a customer or supplier of farm uses" and (2) whether the proposed nonfarm operations are "essential to the practice of agriculture." *See, e.g., Friends of Yamhill County v. Yamhill County* (Ground 152, LLC), LUBA No. 2024-008 at 23-25 (2024) (citing *City of Sandy v. Clackamas County*, LUBA No. 94-104 (1994)).

The case of *Chauncey v. Multnomah County* (LUBA No. 91-012) is examined. In *Chauncey v. Multnomah County*, the Oregon Land Use Board of Appeals (LUBA) addressed whether a proposed wood by-products operation, specifically involving mulching activities, qualified as a "commercial activity in conjunction with farm use" within an Exclusive Farm Use (EFU) zone. The petitioners sought approval to operate a facility that would process wood by-products into mulch. Multnomah County denied the application, concluding that the proposed operation did not meet the criteria for a commercial activity associated with farm use as outlined in the county code.

Upon appeal, LUBA upheld the county's decision, emphasizing that for a commercial activity to be considered "in conjunction with farm use," there must be a demonstrable relationship between the proposed commercial activity and existing farm operations (emphasis added). In this instance, LUBA found insufficient evidence to establish that the mulching operation had a supportive relationship with agriculture in the area. The proposed use did not satisfy the necessary criteria to be deemed a commercial activity in conjunction with farm use.

Applicant seeks to justify that the mulching operation is a primary supplier of farm uses, and that there is a coinciding use of the property as a storage space for logs sold for lumber production does not primarily supply farming operations. Applicant's justification of this

use is that the logs sent to lumber mills spend up to two weeks on the property in storage, but that they do not spend much time beyond this on the Subject Property. Applicant identifies the staging area dedicated to storage of logs for lumber and stated it would take up no more than 6,000 square feet of the area dedicated to the proposed use (which the applicant calculated as 9% of the total area). However, apart from the 9%, a significant portion of the property is used for vehicles and equipment that are used for the tree services and enter and exit the property daily.

Applicant does not satisfy the requirements of MCC 17.136.060(D) because the record does demonstrate mulching is the true “commercial activity” proposed and because any mulching operations on the property are merely incidental, relatively infrequent, and occur only because of the Applicant’s need to store and destroy debris related to Applicant’s tree trimming business. The criterion is not met.

(b) The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.

Applicant must establish that the mulching operation must enhance the farming enterprises of the local agricultural community. In other words, does the proposed conditional use support or benefit existing agricultural activities.

In the Application, Applicant provides supplemental information discussing the role and uses of mulch in agricultural operations, including the retention of moisture and as padding for animals. Applicant argues that providing mulching products to local farmers will enhance their operations in various ways.

Applicant supplied additional information in the form of attestations by local farming operations that receive mulch from the Applicant to support its position that the commercial activity enhances local farming enterprises.

Applicant’s Affidavits from local farming operations establish that the mulch does positively contribute to the farming operations. Applicant supplies and delivers the mulch to local cattle ranches and nurseries without cost.

In opposition to the Application, Adelman argues that the Oregon Land Use Board of Appeals has already held that a proposed mulching operation failed to demonstrate, as a matter of law, that the proposed activity qualified as a commercial activity in conjunction with farm use. *Chauncey v. Multnomah County*, LUBA No. 91-212 (1992). In the Chauncey decision, LUBA affirmed Multnomah County’s denial of a conditional use permit when the record showed that the mulch and wood by-products were provided to both farm uses and nonfarm uses. Adelman argues that the potential universe of non-farm uses is too large to be limited to the farming community.

The use of mulch as provided by Applicant is beneficial to the cattle ranchers and nurseries who receive it. The record supports that mulch as provided to the recipients whom provided Affidavits enhances their farming practices. This criterion is met.

(c) *The agricultural and commercial activities must occur together in the local community to satisfy the statute.*

The subject property for this proposal is located just outside the Brooks-Hopmere community in an area otherwise surrounded by commercial agriculture operations. As described in criterion *b* above, Applicant provided statements by four of the agricultural operations that received mulch from the Applicant in the past. Three operations were located in Marion County and one in the neighboring Polk County. Applicant provides mulch product to the local agricultural community that are located within the central Willamette Valley around Salem. The criterion is met.

(d) *The products and services provided must be essential to the practice of agriculture.*

MCC 17.136.060(D)(4) implements state law and codifies requirements from caselaw. The criterion requires that a proposed commercial activity be “essential” to the practice of agriculture.

Applicant argues that the mulching operations and resulting product is essential to the practice of agriculture. Applicant provided information regarding the uses and benefits of mulch in agricultural operations to support the contention that the service is essential for the practice of agriculture. The Affidavit of Marvin Klopfenstein establishes that Mr. Klopfenstein delivers mulch to cattle ranchers, blueberry farmers, and nursery farms. Mr. Klopfenstein does not charge for the mulch or the delivery of the mulch. (Applicant’s October 31, 2024 Submission, Exhibit G). Dale G. Kaufman submitted an Affidavit that states: “The Applicant’s supply of Mulch Chips to the Cattle Ranch is significant to the Cattle Ranch operations. The Mulch helps fight against the hard ground becoming thick mud where the cattle are at risk of sinking and injury and without the mulch, alternative practices would need to be taken which could result in higher operating costs for KCC (Kaufman Cattle Ranch). (Applicant’s October 31, 2024 Submission, Exhibit H). Applicant provided the Affidavit of Lynn Richman Construction, LLC, in which Lynn Richman states that “Applicant’s supply of Mulch is valued throughout cattle ranch and farming communities. (Applicant’s October 31, 2024 Submission, Exhibit I).

Applicant’s October 31, 2024 submission argues that the affidavits submitted, in addition to the initial application, establishes that the “mulch is a necessity and benefit to cattle ranches.

Applicant provided support for the position that mulch can have a beneficial impact to the practice of agriculture. Applicant establishes that mulch can have the benefits of moisture retention, natural weed suppression, and the protection of soil erosion by mitigating the impact of rainfall and runoff.

Opponents counter Applicant’s argument that mulching is essential to the practice of agriculture with support that mulching is beneficial for home uses, including yard appearance and landscaping. Adelman submits Exhibit 2 to its pre-hearing submission

which states that there can be problems with mulching attaching insects. Increased insects are a concern for Adelman's farming operations located directly across from the Subject Property.

Analyzing whether a nonfarm operation is "essential to the practice of agriculture" is paramount even when the operation primarily or exclusively supplies to farms. *See City of Sandy v. Clackamas County*, LUBA No. 94-104 at 9-10 (1994) (stating that connection must be "closer to the 'essential practice of agriculture'" to be valid). While there is no single test for what is "essential" to the practice of agriculture, the case law gives examples of what is sufficiently "essential" pursuant to Oregon's land use framework. It is not sufficient if the commercial activity's products or services are frequently used – or even indispensable – to farming. The relevant question is whether the commercial activity is something *particularly unique* to farm users and farm use practices.

As stated in *City of Sandy*, "the Oregon Court of Appeals had little difficulty concluding a hop warehouse that would store hops grown by many hops growers, and sell string and burlap used in hop production, qualified as a commercial activity in conjunction with farm use." *Id.* at 9. String and burlap are not exclusively used in hop production, but was approved as part of the commercial activity in conjunction with farm use because it is essential to the production of hops. However, in the hops case, all of the warehouses purchases and sales were to commercial hop growers.

While farmers must eat and farm equipment frequently operates on gasoline, that is not sufficient to make grocery stores or gas stations commercial activities in conjunction with farm use. The connection must be closer to the 'essential practice of agriculture. *Id.* at 9.

The Oregon Land Use Board of Appeals (LUBA) has emphasized the necessity of a direct and substantial relationship between the proposed use and existing farm practices. In *Friends of Marion County v. Marion County and Jones, Seasons at Red Oak Farm*, LUBA 2021-089 (2022), LUBA determined that a program aimed at inspiring youth to pursue agricultural careers did not meet the criteria set forth in MCC 17.136.060(D)(4).

LUBA concluded that the connection between participating in the program and future agricultural employment was "too remote and speculative," and thus did not qualify as providing products or services essential to agriculture. This interpretation underscores that for a conditional use to be approved under MCC 17.136.060(D)(4), Applicant must demonstrate a clear, immediate, and beneficial impact on agricultural practices. The inquiry demanded by caselaw is that indirect support, even if beneficial, does not satisfy the criterion.

The Affidavits submitted by Applicant establish that Applicant does not charge for the mulch. Although Applicant states that the supply of mulch to the cattle farmers and blueberry farmers is "essential to the aforementioned farm operations" (October 31, 2024 Submission, Exhibit G), the farm operators state that the mulch is "significant" to the cattle operations, and without the mulch, alternative practices would need to be taken. (Exhibit H). The supply of mulch is "valued through the cattle ranch and farming communities."

(Exhibit I). Mr. Klopfenstein does not charge for the mulch, and indicates the mulch is provided as service to the agricultural community. However, the lack of cost it is not considered as a significant factor in determining the “essential” nature of the mulch.

The Affidavits do not establish in the record that the mulch is “essential” or that other alternatives could not be used. Opponents establish that mulch has many non-farm or residential uses.

There is insufficient evidence to establish that mulch is essential to the practice of agriculture with particularity, and the criterion is not met.

MCC 17.136.060(A)

8. In addition to the specific criteria above, the proposal must also satisfy the conditional use criteria in MCC 17.136.060(A). Those requirements are:

(a) 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.

Marion County Code 17.136.060(A) outlines the Farm Impacts Test to evaluate whether a proposed conditional use within an Exclusive Farm Use zone will adversely affect existing agricultural operations.

Applicant claims that the proposed commercial use would not force a significant change in accepted agricultural practices in the local area because the location is on a portion of the parcel that was not previously dedicated to farming. Applicant states that the traffic impact will be limited as debris will be picked up and dropped off on an as-needed basis, and the use will be confined to the roughly 1.5-acre area identified on the site plan. Applicant also claims the site has been in commercial use for “many years.” While this last claim is not substantiated by aerial imagery even as recent as 2021, the other three claims are generally substantiated by the available imagery and description of the business process in the application.

The proposed use as a site for commercial mulch generation brings has the potential to introduce tree diseases or insect pests into the local area that could significantly damage local agricultural operations (such as the hazelnut orchard on the adjacent western property) by acting as an introduction point and breeding ground for diseases and pests on a property where the impacted adjacent farmers cannot apply their fungicides or pesticides to combat these threats. While the level of pest introduction is not simple to predict, the proposed activity is capable of critically damaging the economic viability and force a change in local farming practices through the introduction of new pests or diseases that destroy crops grown in the local area.

Mr. Klopfenstein states that diseased trees are not taken to the Subject Property, but rather are taken to a specific location for disposal, which minimizes the risk of the introduction of disease to nearby crops.

Applicant proposes that mitigation measures can be taken against this significant threat and will be taken to protect the existing agricultural practices. Proposed conditions of approval also include setbacks and screening from neighboring agricultural uses to mitigate impacts to nearby properties. Although Mr. Weddle and Mr. Adelman dispute the efficacy of the mitigation measures, conditions of approval could address the concerns if the Application could satisfy all other criteria. It is possible that this criterion could be met.

(b) Adequate fire protection and other rural services are, or will be, available when the use is established.

The Marion County No. 1 Fire District provides the subject parcel with fire protection services and provided comments with their requirements for meeting fire safety code. Other rural services such as a well and septic are already present on site and the Marion County Sheriff provides police services to the site. All other necessary rural services are either present or will be available when the use is established. The criterion is or could be met with the requirements of the Marion County No. 1 Fire District made a condition of approval.

(c) The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.

The proposed activity is not anticipated to have an adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability or water quality, as the activity would be contained to the roughly 1.5-acre area proposed on the site plan. Air quality is a concern, as the proposed use will be conducted out in the open and the dust from the mulching activity can reduce air quality in the local area. Applicant states that they use a watering truck during the mulching activity to prevent dust and small wood particles from escaping the property, which sufficiently addresses air quality concerns.

Mr. Adelman has serious concerns about dust or other airborne particulate matter which he indicates could have a significant impact on his farming practices. However, it is likely that these concerns could be addressed with conditions of approval, and the criterion could be met.

(d) Any noise associated with the use will not have a significant adverse impact on nearby land uses.

Applicant states that the actual mulching of the woody debris occurs on a limited basis. Applicant states that the actual grinding happens approximately 4 times a year, and the grinding does not occur in the summer to mitigate fire risk. Applicant states that the actual time for grinding is 40-60 hours per year. Applicant states that in addition to the actual grinding, other activities would generate typical noise from trucks and tractors. Applicant

states that the vegetative screening that can be made a condition of approval to mitigate the concerns of Opponents and that the condition of approval will reduce the impact of noise on nearby land uses.

Opponents argue that the grinding is “extremely loud with major impacts to surrounding farm uses” and that the noise is in the dangerous category. Steve Adelman argues that the level of noise far exceeds what is expected in an agricultural area and cannot be mitigated by the conditions of approval.

Ms. Reed testified that the level of noise is not similar to typical farm noise of tractors and harvesters. The evidence indicates that the operation is not just grinding, but also includes chainsaws, and equipment to transport the logs and tree debris. Although the actual grinding is approximately four times a year and averages 40-60 hours, the record indicates that there are significant additional noise concerns that impact surrounding farms.

Applicant states that the noise produced by the Commercial Use does not exceed the type of noise ordinarily permitted in the EFU zone and that residential structures to the north and northwest are at a distance that the noise is unlikely to reach them. However, Mr. Adelman’s statement indicates that the noise can be heard approximately one-half mile away and is more akin to a jet engine than anticipated noise from farm equipment. The record is insufficient to establish that the noise from the commercial activity will not have a significant adverse impact on nearby land uses. The criterion is not met.

(e) *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.*

There are no nearby water impoundments or mineral and aggregate sites identified in the Comprehensive Plan which would conflict or be adversely impacted by the proposed use. The criterion is met.

MCC 17.110.680

9. Marion County Code authorizes denial of an application where there is noncompliance with the land use regulations or any other “local, state or federal law[.]” MCC 17.110.680 *see also* MCC 17.110.820. This principal was upheld by the Oregon Court of Appeals in *Woosley v. Marion County*, 118 Or. App. 206 (1993). The only exceptions to the rule are (1) noncompliance with federal marijuana laws is not a basis for denial, and (2) Marion County has discretionary authority to approve an application if “issuance of the permit or land use approval would correct the violation.” *See* MCC 17.110.680.

The Oregon Land Use Board of Appeals recently construed the exact code provision. *See Ivanov v. Marion County*, LUBA No. 2023-076 (2024) In *Ivanov*, LUBA upheld Marion County’s denial of a land use application based upon outstanding violations even when the application otherwise met the approval criteria for the permit. *Ivanov*, at 4-7.

Applicant argues that the Subject Property is no longer in violation of land use regulations because the Staff Decision dated November 8, 2024, granted an approval. The Stipulated Judgment, for its part, does acknowledge the Staff Decision and agrees to withhold any future citations until May 12, 2025.

Applicant suggests that the analysis of possible ongoing violations is not part of the standards and criteria upon which the decision can be based. However, as stated in *Ivanov*, standards and criteria can go beyond what the local government labels “approval criteria” for a specific permit. *See, e.g., Davenport v. Tigard*, 121 Or. App. 135, 141 (1993) (stating that relevant standards and criteria to base decisions on are “not limited to the provisions that may be characterized as approval criteria” (internal quotation marks omitted)); *Ivanov* at 11-14.

Opponents also argue that there are documented concerns that the right-of-way has been improperly used for parking, has been improperly widened, unauthorized parking has occurred in the neighbor’s field, and the stop sign at 57th Ave NE has been knocked over on several occasions resulting in local code violations under MCC Chapter 10.10.

The Hearings Officer finds that Marion County Code Enforcement Officer Chad Goffin was entitled to present testimony and will not strike his testimony from the record. Mr. Goffin also provided comments to the Planning Division on August 23, 2024, which are included in the record. Any testimony provided by Mr. Goffin that purports to attack Applicant’s character is not considered by the Hearings Officer and has no basis with respect to applicable criteria.

No determination is made whether the Applicant is in violation of Marion County Code because the issue of compliance is not imperative based on the prior findings that the proposed use is not primarily a supplier of farm uses and that farm impacts test is not satisfied. However, if the Applicant were in violation of the Code, Marion County has discretionary authority to approve the issuance of the permit or land use approval because with compliance with conditions of approval, the approval would correct the violation. MCC 17.110.680.

VII. Order

It is hereby found that Applicant has not met the burden of proving applicable standards and criteria for approval of a conditional use. Therefore, the conditional use application is **DENIED**.

IX. Effective Date

The application approved herein shall become effective on the 15th day of April, 2025, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this Order. In the event of Board review, this Order shall be stayed and shall be subject to such final action as is taken by the Board.

X. 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, Oregon) by 5:00 on the 14th day of April, 2025. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500.00, and must state wherein this Order fails to conform to the provisions of the applicable code provision(s). If the Board denies the appeal, \$300.00 of the appeal fee will be refunded.

DATED this 28th day of March, 2025.



Jill F. Foster

Marion County Hearings Officer

CERTIFICATE OF MAILING

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

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By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 28th day of March, 2025 and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer