

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of) Case No. 24-007
)
BRUCE ERNST) **COMPREHENSIVE PLAN AMENDMENT**
) **AND ZONE CHANGE**

RECOMMENDATION

I. Nature of the Application

This matter is before the Marion County Hearings Officer on the Application of Bruce Ernst to change the zone from EFU (Exclusive Farm Use) to C (Commercial) and to change the comprehensive plan designation from Primary Agriculture to Commercial, with an exception to statewide planning Goal 3 (Agricultural Land) on a 1.6-acre section of a 13.85-acre parcel located at 19937 Highway 99E, Aurora (T4S; R1W; Section 23C; Tax lot 200).

II. Relevant Criteria

The standards and criteria relevant to this Application are found in the Marion County Comprehensive Plan (Rural Development Policies), and the Marion County Code (MCC) Title 17, especially MCC 17.123, MCC 17.136, and MCC 17.145. Policies relevant to this Application are also found in the State of Oregon Statewide Planning Goals, and Oregon Administrative Rules (OAR 660-004-018 and OAR 660-004-028).

III. Public Hearing

A public hearing was held on this matter on February 5, 2026. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the Application:

- | | | |
|----|---------------|---------------------------------|
| 1. | Austin Barnes | Marion County Planning Division |
| 2. | Chris Fowler | Attorney for Applicant |

No documents were presented, marked, or entered into the record as exhibits. No objections were raised as to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at the hearing.

IV. Executive Summary

Applicant seeks approval of a zone change from EFU (Exclusive Farm Use) to C (Commercial) and to change the comprehensive plan designation from Primary Agriculture to Commercial, with an exception to statewide planning Goal 3 (Agricultural Land) on a 1.6-acre section of a 13.85-acre parcel located at 19937 Highway 99E, Aurora.

The 1.6 subject parcel is very small, oddly shaped, and of extremely limited use because of a railroad right-of-way, and the absence of water rights or an on-site water source. Adjacent properties have all been trending to commercial, agricultural processing, and limited residential

use for 40 years. The parcel has not been farmed, and the existing development pattern limits the ability to conduct any normal farm practices on the parcel.

Based on the totality of the evidence and the cumulative effect of existing conditions and surrounding development, the Hearings Officer finds that the Applicant has satisfied the relevant standards and criteria, and that the Subject Property is irrevocably committed to non-resource use and is not reasonably expected to be used for farm use.

The Hearings Officer recommends that the Marion County Board of Commissioners GRANT the Application to change the zone from EFU (Exclusive Farm Use) to C (Commercial) and to change the comprehensive plan designation from Primary Agriculture to Commercial, with an exception to statewide planning Goal 3 (Agricultural Land) on a 1.6-acre section of a 13.85-acre parcel located at 19937 Highway 99E, Aurora (T4S; R1W; Section 23C; Tax lot 200).

V. Findings of Fact

The Hearings Officer, after careful consideration of the testimony and evidence in the record, issues the following finding of fact:

1. The property is located on the west side of HWY 99E, directly south of its intersection with Fobert Rd NE. The property is currently vacant and covered with various species of trees and shrubs. The property has been the subject of various land use cases, including three Farm Dwelling cases from the 1990's, FD91-013, FD95-003 and FD95-150. It was also the subject of an Administrative Review in 2023, AR23-036 and is considered legal for land use purposes.
2. Properties in all directions except south are zoned EFU and are in various levels of farm production. The area is characterized by filbert orchards and some of the properties have dwellings or packing facilities. To the south is a mobile home park zoned EFU and a parcel zoned C (Commercial) that appears to be used as a personal storage business.
3. Marion County Planning Division requested comments on the proposal from various governmental agencies.

Marion County Public Works Land Development and Engineering Permits (MCPW) provided the following comments:

ENGINEERING ADVISORIES

- A. PW Engineering has no action items for the proposed Zone Change itself.
- B. The following are PW Engineering guidelines for future development:
 - Applicant will need to meet ODOT, Railroad and Marion County requirements for stormwater discharge
 - Applicant will need to coordinate access and utility extensions to Hwy 99E with ODOT.

- Transportation System Development Charges (SDCs) will be assessed at the time of application for building permits.

Oregon Department of Transportation (ODOT) commented:

“We do not have any comments from the access management perspective, this segment of highway is not access controlled and the existing access to the site is presumed to be permitted.”

Marion County Building Department commented:

“No Building Inspection concerns. Permit(s) are required to be obtained prior to development and/or utilities installation on private property.”

The Department of Land Conservation and Development (DLCD) provided a letter regarding the original submission from the applicant. The letter indicated that the application was not sufficient in their eyes. The applicant has since provided additional submissions to address their concerns.

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

V. Additional Findings of Fact and Conclusion of Law

1. This is a recommendation to the Marion County Board of Commissioners (BOC). The BOC is the final decision-making authority.
2. Applicant has the burden of proving compliance with all applicable criteria 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).

Applicant 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, Applicant has not met his 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.

GOAL EXCEPTION

3. Land use applications of this nature must be consistent with Statewide Planning Goals. The subject parcel is covered by Statewide Goal 3 (Agriculture Land). However, ORS

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197.732 and OAR 660-004 provide a mechanism for a Goal exception process that requires specific findings justifying why such lands are not available for resource use. There are three types of exceptions to Statewide Goals that may be granted. The first two are based on the concept that the subject property is “physically developed” or “irrevocably committed” to a certain use. The third is a “reasons” exception where there is a demonstrated need for the proposed use or activity. Applicant states that the proposal qualifies for an irrevocably committed exception.

STATEWIDE PLANNING GOALS

4. Proposals to amend the comprehensive plan must be consistent with the Statewide Planning Goals:

Goal 1: Citizen Involvement. The notice and hearings process provides an opportunity for citizen involvement. The goal is satisfied.

Goal 2: Land use Planning. The subject application would change the zoning. The Hearings Officer makes a recommendation to the Marion County Board of Commissioners who will make the decision on behalf of the County. Marion County Planning division requested comments from various governmental agencies, and their comments are included. The goal is satisfied.

Goal 3: Agricultural Lands. Applicant seeks an exception, which is addressed in detail herein.

Goal 4: Forest Lands. The subject property has not been determined to be forest land. This goal does not apply.

Goal 5: Open Spaces, Scenic and Historic Areas and Natural Resources. The Marion County Comprehensive Plan does not identify any significant open spaces, scenic and historic areas and natural resources on the subject property.

Goal 6: Air, Water and Land Resources Quality. The subject property is not within an identified air quality area. The property is not located in the Sensitive Groundwater Overlay Zone. No activities have been proposed on the property that would use significant amounts of groundwater. Any single commercial use of water using less than 5,000 gallons per day is exempt from water right permitting requirements of the Oregon Department of Water Resources, as long as the water is used for a “beneficial purpose without waste” and may be subject to regulation in times of water shortage.

Goal 7: Areas Subject to Natural Disasters and Hazards. The subject property is not within an identified floodplain or geologic hazards area. This goal is not applicable.

Goal 8: Recreation Needs. No Goal 8 resources are identified on the property. This goal does not apply.

Goal 9: Economic Development. Because the proposal is a rural commercial designation supported by a Goal 3 exception and does not involve urbanization or expansion of urban services, it is consistent with Goal 9.

Goal 10: Housing. This goal applies to housing within an urban growth boundary and, thus, does not apply to this proposal.

Goal 11: Public Facilities and Services. The subject parcels do not require an extension of services with a C (Commercial) zone use, this goal is satisfied.

Goal 12: Transportation. If the zone is changed to Commercial, the existing development will not have a significant impact on the roadway system in this area because of the minimal number of trips associated with the existing uses and the adequacy of the roadway to accommodate the probable level of additional traffic. ODOT did not identify any concerns with this proposal either.

Goal 13: Energy Conservation. There is no indication of energy use increase or decrease based on the proposed zone change and comprehensive plan change. This goal does not apply.

Goal 14: Urbanization. Applicant proposes to rezone rural residential land to Commercial outside of the urban growth boundary. The Commercial (C) zone as applied here is a rural commercial designation acknowledged as consistent with Goal 14. The proposal does not extend urban services or create urban densities, Therefore, no Goal 14 exception is required.

Goals 15-19 are not applicable because the subject property is not within the Willamette River Greenway, or near any ocean or coastal-related resources.

COMPREHENSIVE PLAN AMENDMENT

5. All Comprehensive Plan changes are subject to review by the State Department of Land Conservation and Development (DLCD). DLCD was notified as required by State Law.

DLCD provided a letter in response to the notification, and requested additional findings.

Applicant submitted a response with additional information in support of the Application. Planning Staff found that the additional submission by Applicant sufficiently addressed the concerns raised by DLCD in their letter. DLCD did not provide further comment or otherwise indicated that additional findings were required.

6. An exception based upon land that is irrevocably committed must demonstrate compliance with OAR 660-004-0018(2), which addresses planning and zoning for exception areas. Specifically, the applicant must demonstrate that approval of the exception meets the following requirements: The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and the rural uses,

density, and public facilities and services are compatible with adjacent or nearby resource uses.

7. The Marion County Comprehensive Plan (MCCP) establishes procedures to be used when considering plan amendments. Plan changes directly involving 5 or fewer property owners will be considered a quasi-judicial amendment. The amendment will be reviewed by the zone change procedures established in MCC 17.123. A plan amendment of this type may be processed simultaneously with a zone change request with the zone change procedure outlined in Chapter 17.123 of the MCRZO. The subject property is comprised of one tax lot with one owner, all having an existing use, the proposal can therefore be considered under the quasi-judicial amendment process.
8. The MCCP does not contain specific review criteria for plan amendments; however, any amendment must be consistent with its applicable goals and policies. The goals and policies that apply in this case are located in the Rural Development Chapter and include policies for areas designated Commercial:
 - A. *“Strip-type” commercial or residential development along roads in rural areas shall be discouraged.*
 - B. *Rural industrial, commercial, and public uses should be limited primarily to those activities that are best suited to a rural location and are compatible with existing rural developments and agricultural goals and policies.*

No strip-type development is proposed. The majority of the parcels in the area are currently developed with commercial uses or farm uses and any additional development would not be expected to have any additional impact on surrounding agricultural and rural residential lands. This zone change would extend the commercial zoning to the extent possible allowed by vacant lands in the area, this would make the land more compatible with existing uses as there is already commercial zoning to the south. The area already sees commercial traffic on 99E along with the commercial farm businesses. Applicant did not show any proposed development on the site plan but indicated that the proposal will expand an existing commercial node rather than create a “strip type” development. This proposal would be compatible with existing uses in the area.

9. OAR 660-004-0018 (2) requires that “physically developed” and “irrevocably committed” exceptions to goals, plan, and zone designations shall authorize a single numeric minimum lot size and shall limit uses, density, and public facilities and services to those:
 - A. *That are the same as the existing land uses on the exception site;*
 - B. *That meet the following requirements:*

- i. *The rural uses, density, and public facilities and services will maintain the land as “Rural Land” as defined by the goals and are consistent with all other applicable Goal requirements; and*
 - ii. *The rural uses, density, and public facilities and services will not commit adjacent or nearby resource uses to nonresource use as defined in OAR 660-004-0028; and*
 - iii. *The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;*
- C. *For which the uses, density, and public facilities and services are consistent with OAR 660-022-0030, ‘Planning and Zoning of Unincorporated Communities’, if applicable, or*
- D. *That are industrial development uses, and accessory uses subordinate to the industrial development, in buildings of any size and type, provided the exception area was planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714.*

Because the subject property is not within an unincorporated community and is not in industrial use, C and D do not apply. Marion County has adopted a rural commercial zone which has been acknowledged as complying with Goal 14, Urbanization. The Commercial (C) zone as applied in Marion County is acknowledged to comply with Goal 14 and does not authorize urban levels of development or public facilities. The zone ensures that rural uses will not exceed density limitations on rural land and will not commit rural uses to requiring an urban level of public facilities. The commercial uses which would be allowed under the county’s Commercial zone would be able to be supported on solely a rural level of public services, including rural septic service, and would be similar to the types of uses found in the surrounding land to the south, which is zoned Commercial. The property cannot be farmed in conjunction with any other parcels in the area. No urban public services will be needed to serve the site. The parcels in the area already consist of properties in commercial or residential use. Based on the evidence and findings provided by the applicant and summarized here, the proposal appears to meet the criteria for a goal three exception.

10. OAR 660-004-028 specifies that a local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make the uses allowed by the applicable goal impracticable. It further stipulates that whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent. The findings for a committed exception, therefore, must address the following:

A. The characteristics of the exception area;

- B. The characteristics of the adjacent area and the lands adjacent to it; and*
- C. The relationship between the exception area and the lands adjacent to it; and*
- D. The other relevant factors set forth in OAR 660-04-028(6).*

OAR 660-004-028(6) referenced above indicates that findings of fact for a committed exception shall address the following factors:

- A. Existing adjacent uses;*
- B. Existing public facilities and services (water and sewer lines, etc.);*
- C. Parcel size and ownership patterns of the exception area and adjacent lands:*

(i) Consideration of parcel size and ownership patterns shall include an analysis of how the existing development pattern came about and whether findings against the Goals were made at the time of partitioning or subdivision. Past land divisions made without application of the Goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground utilities) on the resulting parcels or other factors makes unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and non-resource parcels created pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for non-farm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for land adjoining those parcels.

(ii) Existing parcel sizes and contiguous ownership shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations.

D. Neighborhood and regional characteristics;

E. Natural or manmade features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;

F. Physical Development according to OAR 660-004-025; and

G. Other relevant factors.

Applicant has addressed the characteristics and relationship of the exception area and the lands adjacent to it, consistent with OAR 660-004-028, as shown in 12 (A), (B), (C) and

(D) above. The land is segmented and broken off from the lands around it, due to the existence of a railroad right-of-way to the west and Highway 99E to the east. To the north is a narrow strip of EFU land, too small to be used for anything other than a buffer strip between the railroad and highway. This small strip of land gradually grows slimmer until the two rights-of-way combine. To the south are lands zoned Commercial and developed with storage buildings.

If this zone change were to be approved, the subject property would be consistent with this zoning and create a harmonious area of Commercially zoned land, appropriately buffered and separated from EFU lands in the area such that, no adverse impacts would be expected. The surrounding pattern of development, regardless of zoning designation, constrains the subject property's ability to be used for farm use.

The subject property is physically separated from surrounding farm operations by Highway 99E and a railroad right-of-way, which materially limit its integration into adjacent farm units. It is a small, strangely shaped parcel that has no relationship with other lands in the area. Due to its separation and characteristics, it has been left as wasteland, overgrown with trees and shrubs.

As stated herein, the rural C zone permits uses that do not require public facilities such as sewer or water.

Highway 99E and the railroad have split off this sliver of EFU land from its larger, farmable parent parcel. It is now an island constrained on all sides and too small for practicable farm use. These physical and functional constraints render farm use impracticable under existing conditions and prevent the parcel from operating as part of a viable farm unit. (i) above explains how roads may be used to demonstrate that a parcel is irrevocably committed to a non-resource use, this applies here.

Additionally, Applicant submitted an analysis showing how tractors and other farm equipment are too large to be used on the subject property. The owner of the property is a local farmer with many acres of farmland in active production. He provides a statement to the record demonstrating how the irregular and small size of the parcel, coupled with the busy highway, make it nearly impossible to get equipment on the site to be used for planting and harvesting. The Property is a small trapezoidal shape, and the southern end is too narrow for large vehicles or logging trucks to turn around. If the northern or middle portions of the Property were left clear for roads and turn-around space for logging trucks or other vehicles, there would be no space for logging.

Because the parcel is so small, the equipment would have to be driven to the parcel each time a farming practice needed to be done. There is no room on the parcel to build storage barns as this would take much of the land out of any theoretical crop production. Applicant states that with one access and the size and turning radius of farm equipment, he has never been able to farm that portion of the property. The angles of the turns are highly reflexive, for example it would likely be impossible for even regular equipment, let alone articulated vehicles, to physically make the left-hand turn

from 551/Hubbard Cutoff Road south to 99E north at the light without intruding on the opposite lane of the road, as well as navigating on the subject property itself. Finally, the property has no water rights, making small scale agricultural production nearly impossible on the land. No evidence was presented identifying a specific dryland farm use that could reasonably operate on the subject property under its existing constraints. The record contains no evidence of any economically viable farm use, including dryland farming, that could practically occur on the subject property given its size, configuration, and access limitations.

While no minimum parcel size applies, the size and configuration of the subject property affect its practical operability for farm use. The evidence demonstrates that farm use is not reasonably practicable on the subject property given existing conditions.

To address (ii) above, Applicant does own farmlands adjacent to this parcel that are in active farm production as filbert orchards. Applicant has never been able to farm the subject property due to the factors described above and as stated in the application and submitted materials. The physical factors, roads, shape of parcel and inability to locate farm equipment on it, irrevocably commit this parcel to a non-farm use. The criterion is met.

Based on the totality of the evidence and the cumulative effect of existing conditions and surrounding development, the Hearings Officer concludes that the subject property is irrevocably committed to non-resource use within the meaning of OAR 660-004-0028 and is not reasonably expected to be used for farm use in the future, notwithstanding its EFU zoning designation.

ZONE CHANGE

11. Applicant seeks a zone change from EFU (Exclusive Farm Use) to C (Commercial). The criteria for a zone change are found in the Marion County Code Chapter 17.123.060 and include:
 - A. *The proposed zone is appropriate for the Comprehensive Plan land use designation on the property and is consistent with the goals and policies of the Comprehensive Plan and the description and policies for the applicable land use classification in the Comprehensive Plan; and*
 - B. *The proposed change is appropriate considering the surrounding land uses and the density and pattern of development in the area; and*
 - C. *Adequate public facilities, services, and transportation networks are in place, or are planned to be provided concurrently with the development of the property; and*

- D. *The other lands in the county already designated for the proposed use are either unavailable or not as well suited for the anticipated uses due to location, size or other factors; and*
- E. *If the proposed zone allows uses more intensive than uses in other zones appropriate for the land use designation, the new zone will not allow uses that would significantly adversely affect allowed uses on adjacent properties zoned for less intensive uses.*

The Commercial zone is the only zone that implements the rural Commercial designation in the Marion County Comprehensive Plan (MCCP). The MCCP policies that address designating property as Commercial were addressed herein. The proposal is in compliance based on the evidence presented in the goal exception section of this recommendation. There is a small amount of land zoned C in Marion County. Applicant was unable to find any such lands vacant and available. This proposal makes the best use of the vacant land.

The proposed change is appropriate considering the surrounding land uses and the density and pattern of development in the area. The property to the south of the Easterly Portion of the Subject Property is zoned Commercial and is approximately 3.89 acres in size. It is currently utilized as a U-haul transportation rental and self-storage facility. It occupies all of the land to the east of the railroad right-of-way between the right-of-way and Highway 99E. It is highly developed, with 11 large buildings and dozens of vehicles on the property at any given time. This parcel's use is similar to the likely proposed use of the Easterly Portion of the Subject Property, or more likely more intense than the eventual use of the Easterly Portion of the Subject Property if it is rezoned to Commercial.

The Commercial (C) zone implements the Commercial Comprehensive Plan designation and is appropriate given the characteristics of the site and surrounding development. The proposed zone change satisfies the criteria of MCC 17.123.060, and adequate public facilities and services can be provided at a rural level without committing surrounding resource lands to non-resource use.

The criteria for a zone change from EFU (Exclusive Farm Use) to C (Commercial) are satisfied.

VII. Recommendation

It is hereby found that Applicant has met the burden of proving the applicable standards and criteria for approval to change the zone from EFU (Exclusive Farm Use) to C (Commercial) and to change the comprehensive plan designation from Primary Agriculture to Commercial, with an exception to statewide planning Goal 3 (Agricultural Land) on a 1.6-acre section of a 13.85-acre parcel located at 19937 Highway 99E, Aurora (T4S; R1W; Section 23C; Tax lot 200).

Therefore, the Hearing Officer recommends that the Marion County Board of Commissioners GRANT the Application subject to the following conditions that are necessary for the public health, safety, and welfare:

1. The applicant shall obtain all permits required by the Marion County Building Inspection Division.
2. All future development on the property must satisfy the specific development standards in the C zone, chapter 17.145 and the general development standards found in chapter 17.112, 17.113 and 17.118 of the Marion County Code.

VIII. Referral

This document is a recommendation to the Marion County Board of Commissioners. The Board will make the final determination on this Application after holding a public hearing. The Planning Division will notify all parties of the hearing date.

DATED at Salem, Oregon, this 24th day of February, 2026.



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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Marion County Farm Bureau

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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 24th day of February, 2026 and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer