

## THE MARION COUNTY HEARINGS OFFICER

In the Matter of the	)	Case No. CU 19-005
	)	
Application of:	)	Clerk's File No.
	)	
SETH JOYCE	)	Conditional Use

### ORDER

#### I. Nature of the Application

This matter comes before the Marion County Hearings Officer on appeal of the Planning Director's approval of the application of Seth Joyce for a conditional use permit to establish a metal fabrication business as a home occupation on a 6.36-acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 11750 State Street, Salem, Marion County, Oregon (T7S, R1W, S33, tax lot 1900).

#### II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.110, 17.119 and 17.136.

#### III. Public Hearing

A public hearing was opened on this matter on April 3, 2019. No testimony was presented. The hearing was continued to April 17, 2019, at 4:00 p.m. in the Senator Hearing Room. Because the hearing was continued to a time, date and place certain, no additional notice was required for the continued hearing. The hearing was reopened on April 17, 2019. The Planning Division file was inventoried and made part of the record. The following persons appeared and provided testimony on the application:

- |    |               |                      |
|----|---------------|----------------------|
| 1. | Joe Fennimore | Planning Division    |
| 2. | Seth Joyce    | Applicant            |
| 3. | Mark Shipman  | Applicant's attorney |
| 4. | Hannah Warner | Applicant's attorney |
| 5. | Scott Towery  | Appellant/Opponent   |
| 6. | Julie Towery  | Appellant/Opponent   |
| 7. | Tony Kuenzi   | Opponent             |

The following documents were entered into the record as exhibits:

- |       |  |
|-------|--|
| Ex. 1 | Photo of shop building with door open                    |
| Ex. 2 | List of Cascade Iron employees from Michael Nichols, CPA |

No objections were raised to notice, jurisdiction, conflicts of interest, or evidence. Applicant objected to some appellant testimony as irrelevant to applicable criteria. As required by ORS

197.763(5)(b), the hearings officer stated at hearing that testimony, argument and evidence must be directed to applicable criteria, and explained the hearings officer can only consider information relevant to and consistent with the hearings officer's authority. No testimony is stricken from the record, but all testimony is given the weight deemed appropriate by the hearings officer.

#### IV. Findings of Fact

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

1. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The purpose of the designation and zoning is to promote and protect commercial agricultural operations. Non-farm uses, such as home occupations, can be approved when they will have no significant adverse impact on uses in the area. A portion of the property is within the 100 year floodplain of the Pudding River.
2. The property is on the south side of State Street, about 600 feet west of its intersection with 119<sup>th</sup> Avenue SE. The property contains a dwelling, accessory buildings, well and septic system. Based on previous land use decisions for the subject property, the parcel is considered lawfully created for land use purposes.
3. All surrounding properties are zoned EFU.
4. Applicant proposes legalizing an established metal fabrication business as a home occupation. The business is housed in an existing shop.
5. The hearing was continued to allow the Planning Division to request comment on the application from various governmental agencies.

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

#### ENGINEERING CONDITION

*Condition A. Prior to establishment of the home occupation, apply for an Access Review. If changes to access are deemed necessary by the County Inspector, an "Access Permit" will be required. Any modifications will need to be completed within 90 calendar days from the date of permit issuance.*

Driveways must meet sight distance, design and safety standards in accordance with Marion County Code 11.10. Access is typically a Requirement but has been elevated to a Condition as a matter of timing. It was noted during an initial visit that the paved access is approximately 15-foot wide measured at or near the property line and may not be wide enough for large vehicles potentially using it associated with the home occupation.

#### ENGINEERING REQUIREMENT

B. The subject property is within the unincorporated area of Marion County and will be assessed Transportation System Development Charges (SDCs), per Marion County

Ordinance #00-10R. it is noted that 1,500 square feet of the existing 4,000 square foot shop is being proposed for manufacturing and the fee will reflect that.

Marion County Building Inspection commented that a building permit is required for a change in use or occupancy.

Marion County Code Enforcement commented:

Marion County Community Resource Unit, Code Enforcement, received concerns regarding the operation of a commercial business on the property at 11750 State Street SE, Salem. The property is zoned Exclusive Farm Use (EFU). A subsequent investigation and inspection of the property confirmed the operation of Cascade Iron Co owned and operated by property owner Seth Joyce. The investigation and inspection also confirmed other employee's working at the property.

Code Enforcement sent a letter to Mr. Joyce on December 17, 2018 providing him with the code information and corrections necessary to bring his property into compliance. Mr. Joyce through his Attorneys Mark Shipman and Margaret Gander-Vo submitted application for a Conditional Use Permit, in an effort to resolve the violation, on February 4, 2019; however, this approval has been appealed and is currently in the appeal process.

The approval of CU 19-005 did correct the violations found on the property with conditions. One of the conditions listed in CU 19-005 was for the applicant to contact Marion County Building Division regarding a change in use/occupancy for the building used to manufacture the iron pieces advertised for sale. Mr. Joyce did visit with the Marion County Building Division after the February 21, 2019 approval to start the process of obtaining the Change of Use permit; however, he was given incorrect information and was told a Change of Use permit would not be required. Subsequent conversations with the Marion County Building Official confirmed a Change of Use permit is required. Pending the Hearings Officer's decision, if the Planning Division's decision is upheld, there will still be the need for Mr. Joyce to obtain a Change of Use permit through the Marion County Building Division in order to bring his property into compliance.

Marion County Fire District 1 (MCFD1) commented on fire-flow, dry hydrant, fire safety during construction, fire apparatus road distance from buildings and turnarounds, dead end roads, turning radius, no parking sign, premise identification, gate and fire extinguisher requirements.

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

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

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

"Preponderance of the evidence" means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If evidence for any criterion is equal or less, applicant's burden is not met and the application shall be denied. If evidence for every criterion is in applicant's favor, the burden is met and the application shall be approved.

#### MCC CHAPTER 17.119

2. Under MCC 17.119.020, an application for a conditional use may only be filed by certain people, including the owner of the property that is the subject of the application. A personal representative's deed recorded at reel 3838, page 372 of the Marion County deed records shows the subject property was conveyed to Seth Joyce. Seth Joyce owns the subject property and could file the application. MCC 17.119.020 is satisfied.
3. Under MCC 17.119.025, conditional use applications must be signed by certain people, including all owners of the subject property. Property owner Seth Joyce signed the application. MCC 17.119.025 is satisfied.
4. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:
  - (A) That the hearings officer has the power to grant the conditional use;
  - (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
  - (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
5. Under MCC 17.119.100, the Planning Director has the power to decide conditional use applications. The Planning Director approved this application. Under MCC 17.119.140, after the director's final action, interested persons may appeal the Planning Director's decision no later than 15 days after the director's decision was mailed. The decision was mailed on February 21, 2019. Neighbors Julie and Scott Towery are interested persons, and appealed the decision on March 8, 2019. The appeal was timely. Under MCC 17.119.150, on appeal of the Planning Director's decision, the hearings officer shall conduct a public hearing. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. Applicant asks for a conditional use permit to establish a metal fabrication business on the subject property as a home occupation in the EFU zone. MCC 17.136.050(D)(1) lists home occupations, subject to the criteria in

MCC 17.136.060(C) with the filing of a declaratory statement in MCC 17.136.100(C), as a conditional use in the EFU zone. The business can be evaluated as a home occupation use. The hearings officer may hear and decide this matter. MCC 17.119.070(A) is met.

6. MCC 17.136.010 contains the EFU zone purpose statement:

The purpose of the EFU (exclusive farm use) zone is to provide areas for continued practice of commercial agriculture. It is intended to be applied in those areas composed of tracts that are predominantly high-value farm soils as defined in OAR 660-033-0020(8). These areas are generally well suited for large-scale farming. It is also applied to small inclusions of tracts composed predominantly of non-high-value farm soils to avoid potential conflicts between commercial farming activities and the wider range of non-farm uses otherwise allowed on non-high-value farmland. Moreover, to provide the needed protection within cohesive areas it is sometimes necessary to include incidental land unsuitable for farming and some pre-existing residential acreage.

To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.

To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-033-0130 and in some cases more restrictive criteria are applied to ensure that adverse impacts are not created.

The EFU zone is also intended to allow other uses that are compatible with agricultural activities, to protect forests, scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

Non-farm dwellings generally create conflicts with accepted agricultural practices. Therefore, the EFU zone does not include the lot of record non-farm dwelling provisions in OAR 660-033-0130(3). The provisions limiting non-farm dwellings to existing parcels composed on Class IV – VIII soils [OAR 660-033-0130(4)] are included because the criteria adequately limit applications to a very few parcels and allow case-by-case review to determine whether the proposed dwelling will have adverse impacts. The EFU zone is intended to be a farm zone consistent with OAR 660, Division 033 and ORS 215.283.

MCC 17.136 provisions are intended to carry out the purpose and intent of the EFU zone. If applicable MCC 17.136 criteria are met, the proposed use will be in harmony with the purpose and intent of the zone. MCC 17.136 criteria are discussed below and, with conditions, are met. The proposed use is in harmony with the purpose and intent of the EFU zone. MCC 17.119.070(B) is met.

7. The conditional use application is granted subject to conditions necessary for public health, safety and welfare. MCC 17.119.070(C) is met.

#### MCC CHAPTER 17.136

##### *MCC 17.136.060(C)*

8. Under MCC 17.136.060(C), notwithstanding MCC 17.110.270<sup>1</sup> and 17.120.075<sup>2</sup>, home occupations, including parking vehicles in conjunction with the home occupation and bed and breakfast inns, are subject to the following criteria:
  1. A home occupation or bed and breakfast inn shall be operated by a resident of the dwelling on the property on which the business is located. Including residents, no more than five full-time or part-time persons shall work in the home occupation ("person" includes volunteer, nonresident employee, partner or any other person).
  2. It shall be operated substantially in:
    - a. The dwelling; or
    - b. Other buildings normally associated with uses permitted in the zone in which the property is located.
  3. It shall not unreasonably interfere with other uses permitted in the zone in which the property is located.
  4. A home occupation shall not be authorized in structures accessory to resource use on high-value farmland.
  5. A sign shall meet the standards in chapter 17.191 MCC.
  6. The property, dwelling or other buildings shall not be used for assembly or dispatch of employees to other locations.
  7. Retail and wholesale sales that do not involve customers coming to the property, such as internet, telephone or mail order off-site sales, and incidental sales related to

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<sup>1</sup> MCC 17.110.070 contains the home occupation definition.

<sup>2</sup> Applicant's written statement addressed MCC 17.120.075 and MCC 17.136.060(C) criteria, with MCC 17.136.060(C) prevailing in a conflict. The Planning Director addressed only MCC 136.060(C), explaining at hearing that MCC 17.120.075 applies only in zones that specifically incorporate the provision as applicable criteria. The director's interpretation is consistent with the "notwithstanding" language of MCC 17.136.060(C). MCC 17.120.075 does not apply.

the home occupation services being provided are allowed. No other sales are permitted as, or in conjunction with, a home occupation.

9. *Operated by a resident of the dwelling/number of workers.* Seth Joyce, sole property owner, is a resident of the dwelling and operates Cascade Iron Company, LLC (Cascade Iron) on the subject property. Applicant's support statement says Cascade Iron employs three part-time employees, and "Applicant and his sister, who co-own Cascade Iron." Elsewhere, the statement identifies Mr. Joyce's sister as "an off-site social media and customer service manager." At hearing, applicant provided a statement from Cascade Iron's accountant certifying that the company has a four-person payroll, including Mr. Joyce. Applicant's sister was originally included in the employee count but at hearing, applicant said she is an independent contractor rather than an employee and she could fill the fifth slot if she became an employee later.

MCC 17.136.060(C) does not solely address paid employees, but speaks of "persons" that "work in the home occupation" including "volunteer, nonresident employee, partner or any other person..." The four paid employees, including Mr. Joyce, are acknowledged by applicant to be persons who work in the business. Excluding Mr. Joyce's sister in the worker count because of her independent contractor status does not track with MCC 17.136.060(C)'s broad definition of a person who works in a home occupation. The sister's status as co-owner of the business and as its social media and customer service manager is consistent with her being a partner<sup>3</sup> or "other person" working in the home occupation. As of the hearing date, five worker slots were filled. The workers may change but their number is capped at five. The five-worker cap will be included as a condition of any approval. As conditioned, MCC 17.136.060(C)(1) will be met.

10. *Within buildings.* Applicant does not propose using the on-site dwelling as a part of the operation. Applicant's support statement says Cascade Iron uses about 1,500 square feet of the 4,000 square foot on-site shop. Shops are common EFU zone outbuildings. Applicant evaluated home occupation impacts based on using 1,500 square feet of this particular building. With a condition restricting the area of the subject shop building devoted to the metal fabrication business to 1,500 square feet, MCC 17.136.060(C)(2) will be met.
11. *Interference with other uses.* MCC 17.136.020, .030, .040 and .050 list uses permitted, permitted-subject-to-standards, and conditionally permitted in the EFU zone. The subject and surrounding properties to the north, northwest, east, south and southeast, along and near the Pudding River, are wooded. A large farm field abuts the subject property to the west. More large fields are beyond the wooded areas in other directions. Area fields are predominantly in grass seed. Applicant testified to speaking with neighboring farm operators about the metal fabrication business; he found no opposition to the use. Appellants are concerned about people at the business using grinders, welders or other spark or flame emitting equipment in this area surrounded by grass fields and woodland properties. MCFD1 was contacted about the proposal and provided a list of fire district standards. Applicant would, as a condition of any approval, have 60 days from the effective

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<sup>3</sup> Partner is not defined in MCC title 17, but Merriam-Webster's Dictionary includes among the definitions of partner, "2a : one associated with another especially in an action : associate, colleague..." and "3 : a member of a partnership especially in a business // partners in a law firm also : such membership".

date of an approval order to provide proof from MCFD1 that applicant's plans meet all applicable MCFD1 standards. With this condition, farm and residential fire danger concerns will be addressed.

Appellants are concerned that large trucks entering and exiting the subject property will create a traffic hazard because State Street is busy, the driveway for the property is in a dip, and because a driver who delivers to the site mentioned access issues. MCPW commented that the 15-foot wide paved access to the subject property may not be wide enough for large vehicles accessing the business. MCPW wrote that driveways must meet Marion County sight distance, design and safety standards. MCPW requested a condition of approval requiring access review, and having needed access changes completed within 90 calendar days of permit issue. Applicant acknowledged that large delivery trucks come to the property once or twice a month, and agreed to limit large truck deliveries to two per month. By limiting large truck deliveries to twice per month, and with Public Works access review and permitting as conditions of any approval, transportation safety issues will be satisfactorily addressed.

Applicant used the current 1,500 square foot size of the use and the location of the shop building away from surrounding dwellings (about 600' away from appellants' dwelling) to address compatibility with surrounding uses. Putting a cap on shop square footage for the use is a reasonable impact control for the use. The use shall take place in no more than 1,500 square feet of the 4,000 square foot shop at the west end of the subject property.

Appellants Towery, and neighbor Tony Kuenzi who lives east across 119<sup>th</sup> Avenue, are concerned about noise from machinery, grinding and banging on metal interfering with residential use of their properties especially at evening, nighttime and on weekends. Appellant Scott Towery and opponent Tony Kuenzi run metal shops. Mr. Kuenzi does not mind machinery whirring, but objects to the sounds of banging metal, engine fluctuation and employees hanging out after work. He said the Pudding River corridor is amphitheatre-like, and allows sound to travel easily and disturb the quiet enjoyment of his patio after work. Mr. Towery says appellants are exposed to extensive noise at their irrigation and recreation pond and at their dwelling, especially on weekends. He said he can hear a pneumatic grinder from his patio. Ms. Towery said that, while the noise may not be a health hazard, it is annoying and makes it hard to live there. Mr. Towery testified that when the shop door is closed he cannot hear the noise as much, but he also said the door must, by regulation, be kept open when welding is going on. He did not cite to the specific regulation.

Applicant concentrated on farm use when evaluating noise impacts, but residential EFU zone uses must also be considered. Mr. Joyce testified that 95% of the time his business involves no welding, and he said there is no regulation requiring doors to be open during welding with the type of equipment he uses. Mr. Joyce explained that the business is small, that it produces small shelf brackets, towel bar holders and hooks, and that 75% of the time it is just him in the shop, but he has three high school students work for him after school and on weekends. The work normally involves cutting raw metal stock, grinding the edges, drilling holes with a drill press, using a manual metal press bending tool and applying oil-based coatings on some items. Pieces are sent off-property for hard coating. Air is used to blow off dust and run air-powered tools. Mr. Joyce put the air compressor in a separate



enclosed room to help keep noise down. He also insulated the door and shop walls to help dampen noise.

Noise can be subjective. The county developed MCC chapter 8.45 to help quantify noise and judge its effects under objective standards. MCC 8.45.080(A) specifically exempts sounds generated by conditional use permit activities from prosecution under the noise ordinance if conditional use activities are conducted in accordance with the terms and conditions of a permit. Noise standards can be set during the conditional use permitting process for particular conditional uses.

MCC 8.45.060 applies within the Salem-Keizer urban growth boundary (UGB). MCC 8.45.050 applies in all unincorporated areas of Marion County outside the Salem-Keizer urban growth boundary:

- A. It shall be unlawful for any person to produce or permit to be produced, with a sound-producing device, a sound that:
  - 1. When measured at a place on the complainant's property line that is closest to the noise source, or within the complainant's dwelling unit if it is on the same property as the noise source but is not the source of the sound, exceeds:
    - a. Fifty-five dBA at any time between 10:00 p.m. and 7:00 a.m. the following day; or
    - b. Sixty-five dBA at any time between 7:00 a.m. and 10:00 p.m. the same day, except that if the sound-producing device is an off-road vehicle operating in a nonroad area, the sound level may not exceed 80 dBA; or
  - 2. Is plainly audible at any time between 10:00 p.m. and 7:00 a.m. the following day within a dwelling unit that is not the source of the sound;
  - 3. If a measurement of the sound is made, subsection (A)(1) of this section shall supersede subsection (A)(2) of this section and shall be used to determine if a violation exists.

At hearing, applicant's representative stated that MCC noise standards are 70 dBA from 7:00 a.m. and 10:00 p.m., and 65 dBA between 10:00 p.m. and 7:00 a.m. These standards appear in an MCC 8.45.060 table and apply only to commercial and industrial noise generators and receptors. The subject property is outside of the Salem-Keizer UGB and the surrounding noise receptors are neither commercial nor industrial. The 55 dBA and 65 dBA standards in MCC 8.45.050(A)(1) are reasonable and appropriate standards that could be applied here and enforced under MCC chapter 8.45.

Opponents are concerned about noise interfering with residential uses. Sound can be attenuated by distance, and barriers such as insulation, vegetation, intervening buildings,

sound walls, and other methods. Here, the subject and most surrounding properties are wooded. Appellants' dwelling is over 600' from applicant's shop and the pond area appears to be 300' away from the shop. The Kuenzi property is across 119<sup>th</sup> Avenue, beyond the Towery property. Applicant has incorporated some noise dampening methods into his operation, such as insulating the shop building and placing the air compressor in a separate, enclosed room. No formal noise study was conducted, but applicant's attorney went to the subject property, had applicant open the shop door, turn on all of the equipment at once, and work normally. Using a sound meter, the attorney measured noise levels a few feet away from the open-door shop. Measurements averaged 68.2 dBA. The measured average exceeds MCC 8.45.050 standards of 65 dBA (7:00 a.m. and 10:00 p.m.) and 55 dBA (10:00 p.m. and 7:00 a.m.) but all equipment was running at once, the door was open, and the sound measurement was taken only a few feet from the shop. The measurement would have been more instructive if taken from the property line, but still, the measurement is some evidence in the record illustrating that, more likely than not, day time noise standards can be achieved for the proposed use. The night time standard is constraining and less likely to be achieved. The hours of operation should be restricted.

Appellants request a limit of 8:00 a.m. to 5:00 p.m., Monday through Friday. Applicant proposed limiting operating hours to between 8:00 a.m. and 6:00 p.m., seven days a week, saying he needs the 6:00 p.m. quitting time and the weekend hours to allow the high school students to continue working. Operating the business until 6:00 p.m., Monday through Friday is not unreasonable. The weekend hours are a tougher call because it potentially allows the shop to operate 365 days a year, with no break. Opponents point out that farm noise, expected in a farm zone, may be disturbing at times, but that a lot of the work is seasonal and the quality different from year-round industrial noise. Given the nature of the requested use and quality of sounds emanating from the shop, weekend business use of the shop, shall be limited to Saturdays only and only from 9:00 a.m. to 3:00 p.m.

With in place regulations and conditions of approval discussed here, it is more likely than not that the proposed use will not unreasonably interfere with other EFU zone uses, and MCC 17.136.060(C)(3) will be satisfied.

12. *Structures accessory to resource use.* The subject property is in an EFU zone. Under MCC 17.136.140, high-value farmland means a tract composed predominantly of:

1. Soils rated Class I or II, prime, or unique, either irrigated or not irrigated;
2. The following Class III soils: Chehalem (CeC), Concord (Co), Hullt (HuD), Jory (JoD), Nekia (Nec, NeD, NkC), Salkum (SkD), Silverton (SuD), and Woodburn (WuD);
3. The following Class IV soils: Bashaw (Ba), Camas (Ca), Courtney (Cu), Dayton (Da), and Jory (JoE).

On-site soil capabilities were not addressed by applicant or county, but a Marion County soils analysis detail printout shows 44.3% of the subject property are class III NeC and NeD high-value farm soils as listed in MCC 17.136.140(2). The remaining 55.7% of the parcel is made up of class III Waldo (Wa) soils. Waldo soils are not listed as class III high-value soils

in MCC 17.136.140(2), and are not class I, II, prime or unique soils according to the US Department of Agriculture (USDA) Natural Resources Conservation Service (NCRS) web Soil Survey of Marion County Area, Oregon.<sup>4</sup> Waldo soils are also not listed as a high value soils in OAR 660-033-0020 or ORS 215.710. The subject property is not predominantly made up of high-value farm soils and is not high-value farmland. MCC 17.136.060(C)(4) does not apply.

13. *Signs.* No business signs are currently on the subject property. Any future business-related sign added to the property must comply with MCC chapter 17.191 standards. This requirement can be made a condition of approval. As conditioned, MCC 17.136.060(C)(5) will be met.
14. *Assembly and dispatch.* All fabrication work is done on-site. Assembly and dispatch of employees is not proposed, and a condition of approval can prohibit employee assembly and dispatch. As conditioned, MCC 17.136.060(C)(6) will be met.
15. *Sales.* All retail purchases are shipped directly to customers. No retail sales to on-site customers are planned. With a condition of approval prohibiting on-site retail and wholesale sales, MCC 17.136.060(C)(7) can be met.

*MCC 17.136.060(A)*

16. According to MCC 17.119.010, a conditional use is an activity that is similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. The following MCC 17.136.060(A) criteria apply to all conditional use application reviews in the SA 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.

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<sup>4</sup> The hearings officer takes official notice of the USDA NRCS web soil survey, a government publication named as a source for soil classes, ratings and designations in OAR 660-033-0030.

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.
17. *Farm and forest practices.* Under *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), a county must first identify accepted farm and forest practices occurring on surrounding farmland and forestland, and then analyze whether a proposed use will force a significant change in those accepted farm and forest practices, or will significantly increase the cost of those practices.

The subject property is in a wooded area along the Pudding River. The only farm field adjacent to the property is a grass field to the west. Applicant noted ground level spraying, swathing and combining as farm practices occurring on the neighboring property. Applicant's representative spoke with the farm operator and found no opposition to the metal fabrication use. Applicant spoke to neighbors north of State Street and they also expressed no concern with the proposed use. Other grass fields in the general area are more distant, beyond the wooded areas and roadways. Given the added distance and intervening vegetative buffer, the proposed use is unlikely to affect accepted farm practices or their cost. Properties east and south of the subject property are wooded and in forest deferral. No timber operations were identified on those properties, but occasional woodlot use can be assumed. Potential fire hazards could hinder woodlot use, but were addressed above. As noted there, a condition of any approval could require applicant to submit proof from the fire district showing compliance with fire district requirements. With this condition and a condition requiring applicant to sign and record a farm/forest declaratory statement, it is more likely than not that the proposed use will not interfere with farm or forest practices. As conditioned, MCC 17.136.060(A)(1) will be met.

18. *Adequate fire protection and other rural services.* Utilities, such as electric and telephone services are currently available to the site. On-site water and septic services are in place on the property. Police services are provided by Marion County. MCFD1 provides fire protection services for the subject property. The fire district was notified of the proposed use and provided comments for the record. To ensure public safety, a condition of any approval will require submission of proof from the fire district that the proposal meets all fire department access, premises identification and other fire and life safety requirements including any needed on-site turnaround. Traffic safety and property access concerns are addressed by an MCPW LDEP-requested condition requiring access review and completion of improvements within 90 days of permitting. With conditions, fire, transportation and other services are or will be adequate and MCC 17.136.060(A)(2) will be met. .
19. *Significant adverse impact.* The subject site is not in an MCCC-identified sensitive groundwater, geologically hazardous, wildlife or big game habitat area. No alteration of topography will occur. The Pudding River is an MCCC-identified sensitive headwater that traverses the property. Portions of the subject property are within the river's identified floodplain overlay zone. The shop where the business takes place is elevated above the floodplain. Applicant indicated no chemicals are used in the business but stated that an oil-based coating is applied to some products. All petroleum or other oil-based products and

any chemicals must be stored in accordance with any state, federal or local laws and regulations to prevent any potential release into sensitive headwaters. This can be made a condition of any approval. No water use or wastewater will be associated with the proposed use. As conditioned, there will be no significant threat to watersheds, groundwater, fish and wildlife habitat, or soil and slope stability, and MCC 17.136.060(A)(3) will be met.

20. *Noise.* Noise was discussed in section V(11) above. That discussion is adopted here. With conditions adopted from section V(11), MCC 17.136.060(A)(4) will be met.
21. *Water impounds/mineral and aggregate sites.* No MCCC identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is met.

MCC 17.136.100(C)

22. Under MCC 17.136.100(C), for all dwellings, and other uses deemed appropriate, the property owner shall be required to sign and allow the entering of the following declaratory statement into the chain of title of the lot(s) or parcel(s):

The property herein described is situated in or near a farm or forest zone or area in Marion County, Oregon, where the intent is to encourage, and minimize conflicts with, farm and forest use. Specifically, residents, property owners and visitors may be subjected to common, customary and accepted farm or forest management practices conducted in accordance with federal and state laws that ordinarily and necessarily produce noise, dust, smoke and other impacts. The grantors, including their heirs, assigns and lessees do hereby accept the potential impacts from farm and forest practices as normal and necessary and part of the risk of establishing a dwelling, structure or use in this area, and acknowledge the need to avoid activities that conflict with nearby farm and forest uses and practices, grantors will not pursue a claim for relief or course of action alleging injury from farming or forest practice for which no action is allowed under ORS 30.936 or 30.937.

The declaratory statement would be required as a condition of any approval. As conditioned, MCC 17.136.100(C) would be satisfied.

MCC 17.110.680

23. Under MCC 17.110.680:

No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law, except federal laws related to marijuana, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation.

The subject property is under enforcement action for operating the proposed use without land use approval. With conditions, the operation will meet applicable criteria, the conditional use permit can issue, and the violation will be cured.

## VI. Order

It is hereby found that applicant has met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a metal fabrication business on a 6.72-acre parcel in an EFU zone have been met. Therefore, the conditional use application is **GRANTED**, subject to the following conditions which are necessary to protect the public health, safety and welfare:

1. Within 60 days of the effective date of this order, applicant shall obtain approval for all required Marion County Building Inspection Division permits, including a permit for change of use or occupancy for the business.
2. Within 60 days of the effective date of this order, applicant must provide proof to the Planning Division from Marion County Fire District 1 that the use complies with building access and premise identification regulations and other fire code provisions.
3. Applicant shall apply for access review through MCPW. Any access changes deemed necessary by the county inspector requires an access permit, and any required modifications must be completed within 90 calendar days of permit issuance.
4. The use shall be operated in the shop at the west end of the subject property as proposed in the application. No more than 1,500 square feet of the shop building shall be devoted to the conditionally permitted use.
5. Any sign associated with the conditional use shall meet the standards in MCC chapter 17.191.
6. The subject property, dwelling and other buildings shall not be used for assembly or dispatch of employees to other locations.
7. On-site retail and wholesale sales in conjunction with the home occupation are prohibited.
8. No more than five full-time or part-time persons shall work in the home occupation.
9. No more than two large truck deliveries are allowed per month.
10. All petroleum and other oil-based products and all chemicals must be stored in accordance with any state, federal or local laws and regulations.
11. Hours of operation are limited to Monday through Friday, from 8:00 a.m. to 6:00 p.m. and Saturday from 9:00 a.m. to 3:00 p.m.

12. Applicant shall sign and enter an MCC 17.136.100(C) declaratory statement into the chain of title for the subject property.
13. Noise standards contained in MCC 8.45.050(A) are applied to this use, and may be enforced in accordance with MCC chapter 8.45.
14. Failure to continuously comply with conditions of approval may result in this approval being revoked. Any revocation can be appealed to a Marion County hearings officer for public hearing.

#### **VII. Other Permits**

The applicant herein is advised that the use of the property proposed in this application may require additional permits from other local, state, or federal agencies. The Marion County land use review and approval process does not take the place of, or relieve the applicant of responsibility for, acquiring such other permits, or satisfy any restrictions or conditions thereon. The land use permit approved herein does not remove, alter, or impair in any way any covenants or restrictions imposed on this property by deed or other instrument.

#### **VIII. Effective Date**

The application approved herein shall become effective on the 2<sup>nd</sup> day of July 2019, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

#### **IX. Appeal Rights**

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 1<sup>st</sup> day of July 2019. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 14<sup>th</sup> day of June 2019.



Ann M. Gasser  
Marion County Hearings Officer

## CERTIFICATE OF MAILING

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

Seth Joyce  
11750 State Street  
Salem, OR 97317

Mark Shipman  
Saalfeld Griggs PC  
250 Church Street SE, Suite 200  
Salem, OR 97301

Scott and Julie Towery  
11850 State Street  
Salem, OR 97317

Tony Kuenzi  
1350 119<sup>th</sup> Avenue SE  
Salem, OR 97317

Hannah Warner  
Saalfeld Griggs PC  
250 Church Street SE, Suite 200  
Salem, OR 97301

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

### Agencies Notified

Planning Division

(via email: [gfennimore@co.marion.or.us](mailto:gfennimore@co.marion.or.us))  
(via email: [breich@co.marion.or.us](mailto:breich@co.marion.or.us))  
(via email: [lmilliman@co.marion.or.us](mailto:lmilliman@co.marion.or.us))  
(via email: [pdom@co.marion.or.us](mailto:pdom@co.marion.or.us))

Code Enforcement

(via email: [bdickson@co.marion.or.us](mailto:bdickson@co.marion.or.us))  
(via email: [lpekarek@co.marion.or.us](mailto:lpekarek@co.marion.or.us))

Building Inspection

(via email: [twheeler@co.marion.or.us](mailto:twheeler@co.marion.or.us))  
(via email: [deubanks@co.marion.or.us](mailto:deubanks@co.marion.or.us))

Assessor

(via email: [assessor@co.marion.or.us](mailto:assessor@co.marion.or.us))

PW Engineering

(via email: [jrassmussen@co.marion.or.us](mailto:jrassmussen@co.marion.or.us))  
(via email: [mhepburn@co.marion.or.us](mailto:mhepburn@co.marion.or.us))

MCFD No. 1

(via email: [paulas@mcfcd1.com](mailto:paulas@mcfcd1.com))

DLCD

(via email: [timothy.murphy@state.or.us](mailto:timothy.murphy@state.or.us))

AAC Member No. 3 (no members)

Mary Kyle McCurdy  
1000 Friends of Oregon  
133 SW 2<sup>nd</sup> Avenue, Suite 201  
Portland, OR 97204

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 14<sup>th</sup> day of June, 2019, and that the postage thereon was prepaid.



Susan Hogg  
Secretary to Hearings Officer