

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, December 7, 2022

9:00 a.m.

Senator Hearing Room  
555 Court Street NE  
Salem, OR 97301

**PRESENT:** Commissioner Danielle Bethell, Commissioner Colm Willis, and Commissioner Kevin Cameron. Also present were Jan Fritz, chief administrative officer, Jane Vetto as county counsel, and Brenda Koenig as recorder.

Commissioner Bethell called the meeting to order at 9:00 a.m.

Commissioner Willis arrived at 9:14 a.m.

*(Video Time 00:01:19)*

**PUBLIC COMMENT**

Commissioner Kevin Cameron:

- Commissioner Cameron read an email for the record that was submitted by Frank and Nancy Carpenter that expressed the following:
  - Frank and Nancy Carpenter are concerned about their votes in Oregon elections;
  - They do not feel that Oregon elections are secure;
  - The Carpenters feel disenfranchised with the elections;
  - They know many individuals who no longer vote in Oregon because they feel disenfranchised;
  - They would like Oregon's elections to be fair, secure, and transparent;
  - The Carpenters would like litigation to move forward to protect their 14th Amendment rights to the United States Constitution; and
  - The Carpenters would like their email submitted into the record at a Marion County Board of Commissioners meeting.
- Commissioner Cameron expressed the following:
  - This subject was discussed at the November 30, 2022, Marion County Board Session meeting;
  - Under state statute, the Marion County Board of Commissioners has no control over the following:
    - The courts; and
    - Elections.
  - The Marion County Clerk is an elected official; and
  - The county is working on different issues to ensure the election process is as secure as possible.

(Video Time 00:03:02)

## PRESENTATION

1. Oregon Garden Biannual Report. –Kelli Weese, Ken Hector, Oregon Garden Foundation Chair, and Delen Kitchen, Oregon Garden Foundation Director of Operations

### ***Summary of presentation:***

- The county is in the final year of a five-year contract with the Oregon Garden Foundation:
  - The county allocates \$100,000 each year from the economic development program's lottery fund; and
  - The current contract will expire on June 30, 2023.
- Fifteen new employees have been hired in the last year:
  - Some are part-time or seasonal employees; and
  - Core staff increased from 10 employees to 15 employees:
    - Four employees were hired into the horticulture department which maintains the garden.
- Fifty volunteers were added in 2022:
  - Approximately half of the individuals became ongoing volunteers; and
  - The other individuals volunteered at one-time events, or as part of a group project.
- Earned revenue was up six percent in 2022 over last year, and includes the following revenue streams:
  - Admissions;
  - Sales in the nursery and gift shop;
  - Membership dues; and
  - Venue rentals.
- The earned revenue does not include revenue that comes from grants, or donations that are given as restricted donations;
- Year-to-date the garden has received \$42,000 in restricted and unrestricted donations:
  - Through donations the garden purchased a laser engraver that will allow them to make new labels for the plants.
- The Oregon Garden received approximately \$4,200 in-kind donations, including materials, supplies, and services:
  - The garden received a donation of a giant jade plant that had been in the donor's family for approximately 100 years.
- An estimated \$2,700 was received for the memorial donation program;
- Several events were held at the garden including:
  - Homeschool Day:
    - The garden partnered with the Oregon Forest Resources Institute; and
    - Over 700 homeschool students participated.
  - A fireworks celebration held on July 3, 2022:
    - Approximately 6,000 people attended.

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- Art in the Garden:
  - Art is displayed during the months of May through September each year;
  - Art entries have expanded; and
  - Revenues have increased approximately six percent from the prior year.
- Overall public event revenues have increased approximately 34 percent from the prior year;
- Private events include some of the following:
  - Thirty-nine weddings:
    - Weddings increased in 2022; and
    - One wedding was featured in a bridal guide magazine.
  - Celebrations of life;
  - Birthday parties;
  - Corporate events:
    - Private event revenue has increased an estimated 26 percent.
- A lot of time has been spent beautifying the grounds:
  - There have been many challenges over the last couple of years due to wildfire smoke, heat waves, and the ice storm;
  - The majority of the garden's resources have gone towards bringing the garden back to where it needs to be;
  - A significant number of invasive plants were removed;
  - A number of new plants were installed throughout the garden; and
  - Several water features are now running.
- The following infrastructure improvements were made:
  - The roof of the pavilion has been repaired;
  - The deck on the fire safe house has been replaced;
  - New lighting has been installed, and existing lighting has been repaired; and
  - Paths and stairs have been improved.
- The 2022 holiday bazaar will be held on December 17th and 18th:
  - This is an indoor event, without any outside lights; and
  - The event entails some of the following:
    - Food and beverages;
    - A local artisan market;
    - Holiday crafts; and
    - Santa will be present.

***Board discussion:***

- Commissioner Bethell expressed the following:
  - She was at the garden for a large event in November;
  - She was impressed with the staff that she interacted with;
  - She appreciated the effort and attention staff provided; and
  - She suggested that nighttime lighting be added to the stairs from the upper parking lot to the main building;

- Mr. Hector expressed the following:
  - Old light fixtures are being replaced with new fixtures that will illuminate the ground better;
  - The upper parking lot will ultimately require paving; and
  - They have received an estimate for lighting in the parking lot and they are working on funding for the project.
- Commission Cameron thanked the entire Oregon Garden team for their work:
  - There may be the potential to utilize economic development dollars to assist with the funding to pave of the upper parking lot.
- The garden may be able to find someone to develop an app that would include a route map for the property and information on the garden's plants:
  - The garden has experimented with Quick Response (QR) codes that link to a map; and
  - Oregon State University has a horticulture extension program that might be able to assist.
- The county has had a good partnership with the Oregon Garden for multiple years.

*(Video Time 00:23:40)*

## **CONSENT**

### BOARD OF COMMISSIONERS

2. Approve an order appointing Colm Willis as Chair, Kevin Cameron as Vice Chair, and Danielle Bethell as Second Vice Chair of the Marion County Board of Commissioners to serve from January 2, 2023, until the first Monday of January 2024.

3. Approve a resolution appointing Jan Fritz as the county's representative to the Courthouse Square Condominium Association, and a Memorandum of Action electing Jan Fritz and Allan Pollock as directors effective January 1, 2023.

### HUMAN RESOURCES

4. Approve a recommendation to adopt and establish the classification and the pay grade for Stormwater Program Supervisor under class code #442.

### SHERIFF'S OFFICE

5. Approve the incoming funds Grant Award Agreement with the United States Department of Justice (DOJ), Bureau of Justice Assistance (BJA) in the amount of \$221,171 for the Fiscal Year 2021 State Criminal Alien Assistance Program (SCAAP) through April 30, 2023.

**MOTION:** Commissioner Cameron moved for approval of the consent agenda. Seconded by Commissioner Willis; motion carried. A voice vote was unanimous.

(Video Time 00:25:14)

## **ACTION**

### **PUBLIC WORKS**

6. Consider approval of Amendment #2 to the Architectural and Engineering Standard Professional Services Agreement with Keller Associates, Inc. to add \$1,784,380 in American Rescue Plan Act (ARPA) funding for a new contract total of \$1,913,020 for environmental permitting services, subsurface exploration, groundwater investigation, facility planning, commercial septic system design, and related services through December 31, 2026.

–Ryan Crowther

#### ***Summary of presentation:***

- Marion County received \$50 million in American Rescue Plan Act (ARPA) funds for the design, permitting, and construction of the North Santiam Sewer Project;
- Marion County has agreed to deliver the project on behalf of the North Santiam Sewer Authority and its member cities;
- On May 20, 2022, the county selected a consultant team, led by Keller Associates Inc., to provide a comprehensive suite of engineering and other professional services;
- The large multi-phase project has an aggressive expenditure deadline and schedule that is driven by ARPA funding requirements;
- The full scope of services required to deliver the project will be executed in a series of amendments:
  - This will help ensure that work begins without delay and schedule deadlines are met.
- On October 7, 2022, the county executed a contract with Keller Associates, Inc.:
  - Amendment #1 was executed on October 19, 2022.
- Amendment #2 allows for the following:
  - Environmental permitting services;
  - Subsurface exploration;
  - Groundwater investigation;
  - Facility planning;
  - Commercial septic planning and design; and
  - Other related services.
- The amendment adds \$1,784,380 in ARPA funding;
- The new contract total is \$1,913,020;
- There is no county match to the funding; and
- The project is budgeted in the county's current fiscal year.

#### ***Board discussion:***

- Following are some of the steps that are included in the project:
  - The project was planned prior to receipt of the ARPA funding;
  - Engineers work on the design process which includes:
    - Soil sampling; and

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- Determining which land will be utilized for the project.
    - There is a full environmental process:
      - The large project will utilize federal funding, so there is an extensive environmental process which includes:
        - Archeological studies;
        - Historical studies; and
        - Hazardous materials studies.
    - Finalize the design.
  - The sewer system will be close to an important waterway:
    - It is a priority that water source be protected;
    - Water needs to be drinkable when it moves back into the environment from the waste system; and
    - The county does not want any contaminants to seep into rivers or the farmland.
  - Linn County is involved in the project because the new system will start on Linn County's side of the City of Mill City;
  - The project has been in the works for years; and
  - The project is important for recovery from the 2020 wildfires.

**MOTION:** Commissioner Willis moved to approve Amendment #2 to the Architectural and Engineering Standard Professional Services Agreement with Keller Associates, Inc. to add \$1,784,380 in American Rescue Plan Act (ARPA) funding for a new contract total of \$1,913,020 for environmental permitting services, subsurface exploration, groundwater investigation, facility planning, commercial septic system design, and related services through December 31, 2026. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.

*(Video Time 00:33:32)*

7. Consider approval of Amendment #1 to the incoming funds Intergovernmental Agreement with the Oregon Department of Transportation (ODOT) to add \$297,701 of which an estimated \$267,127 will be provided in federal funds and an estimated \$30,574 will be provided in county funds, for a new contract total of \$3,131,301 for the Mill Creek Road Bridge Replacement Project through November 30, 2030. –Ryan Crowther

***Summary of presentation:***

- The project is located on Mill Creek Road between the City of Turner and the City of Aumsville;
- The project will replace one of four identical bridges;
- The existing structure was built in 1930, and is approaching the end of its useful life;
- The project scope includes the following:
  - Replacing the existing bridge with a new structure that will meet all current requirements;

- Realigning 70th Avenue SE to accommodate the new bridge; and
- Adding guardrail protection.
- The amendment does not change the project scope;
- The amendment adds budget to cover consultant design costs;
- The amendment also moves the county’s right-of-way obligation date back to address environmental permitting concerns;
- The original project estimate was \$2,833,600; and
- The amendment adds \$297,701 in funding:
  - An estimated \$267,127 will utilize federal funds.
- The new project total is \$3,131,301.

**Board discussion:**

None.

**MOTION:** Commissioner Cameron moved to approve Amendment #1 to the incoming funds Intergovernmental Agreement with the Oregon Department of Transportation (ODOT) to add \$297,701 of which an estimated \$267,127 will be provided in federal funds and an estimated \$30,574 will be provided in county funds, for a new contract total of \$3,131,301 for the Mill Creek Road Bridge Replacement Project through November 30, 2030. Seconded by Commissioner Willis; motion carried. A voice vote was unanimous.

*(Video Time 00:37:11)*

**Recessed at 9:37 a.m.**

**Reconvened at 9:39 a.m.**

*(Video Time 00:39:23)*

**PUBLIC HEARINGS  
9:30 A.M.**

**COMMUNITY SERVICES**

A. Public hearing to consider program year 2021 Consolidated Annual Performance Evaluation Report (CAPER) for the Community Development Block Grant (CDBG) and HOME Investment Partnership Entitlement Programs. –Tim Glisson

***Summary of presentation:***

- Program Year 2021 started on July 1, 2021, and ended June 30, 2022;
- In December 2021, the Consolidated Plan was approved by the United States Department of Housing and Urban Development (HUD):
  - The Consolidated Plan is the 5-year planning document for the use of the funds.
- In January 2022, a substantial amendment was completed to the Annual Action Plan:

- The amendment moved funds to down-payment assistance and owner rehabilitation.
- In June 2022, the required program policies and procedures were finalized and adopted;
- An estimated \$590,805 in HOME Investment Partnership funding has not been spent;
- The HOME Investment Partnership budget includes funding for the following:
  - The Community Housing Development Organizations (CHDO) Set-Aside;
  - The Down Payment Assistance Program; and
  - Administrative expenses:
    - An estimated \$30,320 in administrative costs has been spent.
- The Community Development Block Grant (CDBG) budget has allocated funding for some of the following:
  - An estimated \$50,000 for food bank support for Neighbors Serving Unsheltered Neighbors;
  - An estimated \$250,000 for the Center for Hope and Safety's HOPE Plaza:
    - An estimated \$62,901 has been spent on engineering; and
    - Construction has started.
  - An estimated \$948,956 for owner rehabilitation; and
  - An estimated \$312,238 for administrative costs:
    - An estimated \$215,002 has been spent.
- A review of the 5-year Consolidated Plan shows that most of the first year was spent building the foundation of the program;
- The Consolidated Annual Performance Evaluation Report (CAPER) must include the following data:
  - Demographic data;
  - Section 3 data, which regards construction projects:
    - HUD encourages hiring individuals within the community where the project is being built:
      - Currently the county does not have any construction projects.
  - Other data that HUD requires.
- Future projects entail the following:
  - Soaring Heights transitional housing; and
  - Staffing expenses for the Boys & Girls Club's Epping Center located on Lancaster Drive.
- It can be complicated to become an eligible project under the CDBG:
  - The following steps were taken to evaluate the Boys & Girls Club:
    - The individual school districts within the new Epping Center's service area were reviewed:
      - Impacted students were considered;
      - The Boys & Girls Club had to verify the Low to Moderate Income (LMI) status of the area by collecting data from some of the following documentation:
        - Medicaid cards;



- Housing vouchers; or
  - Letters showing a student receives free or reduced lunch from the school.
- The CDBG funds are a new funding source for the organization.
- The county has responsibilities for certifying environmental reviews for projects before spending any of the funds:
  - One project is the North Willamette Habitat for Humanity 18-unit subdivision being built in City of Silverton.
- Potential future projects include some of the following:
  - Infrastructure work in the City of Mt. Angel resurfacing roads and rebuilding sidewalks;
  - Rehabilitation of the City of Saint Paul Creamery; and
  - Some of the following jurisdictions and organizations were consulted with to help identify potential projects:
    - The City of Stayton;
    - The City of Mill City;
    - The City of Woodburn;
    - The HIV Alliance;
    - The City of Aumsville;
    - The City of Mt. Angel;
    - Family Building Blocks;
    - Silverton Area Community Aid;
    - Community Resource Trust;
    - The Marion County Housing Authority;
    - The Union Gospel Mission's Simonka Place; and
    - Bridgeway Recovery.
- Projects are required to meet one of the following CDBG national objectives:
  - Low to Moderate Income (LMI):
    - Area benefit;
    - Limited clientele;
    - Housing; or
    - Jobs.
  - Slum and Blight:
    - Area basis;
    - Spot basis; or
    - Urban renewal.
  - Urgent need.
- Every three years the county sends letters to all of its jurisdictions to notify them that they have the ability to stay under the county's program, or they can default back to the state's program:
  - Jurisdictions can opt out of the county's program if they wish.

- HOME Program projects have eligibility requirements which entail some of the following:
  - Rehabilitation;
  - Rental housing;
  - Tenant based rental assistance; or
  - Homebuyer.

***Board discussion:***

- If the county allocates money to an organization such as Habitat for Humanity, Section 3 rules may differ because a lot of the organizations work is provided by volunteers and their contracts may be less than what is required under Section 3:
  - It was requested that staff investigate further whether or not the county could require Section 3 language to apply in future contracts.
- Members of the public are welcome to contact the county if they have questions about any of the funded projects:
  - Organization pamphlets may be available.
- If a city participates in the county's program, then programs within that city's jurisdiction can receive access to these funds:
  - One challenge that has been encountered in the wildfire recovery is that the City of Gates is not currently a part of the county's program:
    - Program dollars cannot be allocated to projects located in the City of Gates; and
    - The City of Gates is considering opting into the county's program.
- Commissioner Bethell encourages all cities to remain a part of the program so that the county can help support programs within their communities;
- A lot of hard work has been put into programs over the prior two years:
  - The work has been challenging to develop a federal program; and
  - Complicated federal rules need to be followed so that the county does not lose funding.
- Housing is a priority with the county:
  - The program assists with housing concerns.
- No one signed up for public comment for the hearing, and no motion is required today.

**MOTION:** Commissioner Cameron moved to close the public hearing.  
Seconded by Commissioner Willis. There was no voice vote.

(Video Time 00:58:31)

## PUBLIC WORKS

B. Public hearing to consider the hearings officer's recommendation for Conditional Use (CU) Case #20-044/Jeff and Heidi Jones, Seasons at Red Oaks Farm. –Lindsey King

### ***Summary of presentation:***

- The item is to consider the remand of a Conditional Use (CU) to operate a commercial use in conjunction with farm use on a 74.5-acre parcel in an Exclusive Farm Use (EFU) zone;
- The parcel is located on Arbor Grove Road in the City of St. Paul;
- The commercial business that is proposed is a farm experience program for youth and families;
- The board heard the case on July 28, 2021, continued the hearing until August 11, 2021, and issued a decision of approval;
- The case was appealed to the Land Use Board of Appeals (LUBA), and they issued a remand of the decision on April 21, 2022:
  - The remanded items were broken down into several different issues:
    - LUBA found that the criteria for the county approving commercial activities in conjunction with farm use had not been met because of the three following items:
      - Applicants have not established any farm use on the property with which commercial activities are in conjunction;
      - Applicants have not established that the commercial activities are in conjunction with farming; and
      - Applicants have not established that the commercial activities satisfy the farm impacts test.
- On September 22, 2022, the applicants submitted a reconsideration request to the LUBA remand with a modified proposal;
- The board remanded the case back to the hearings officer for a recommendation;
- The hearings officer held a public hearing on October 20, 2022, and issued a recommendation on November 17, 2022:
  - The hearings officer recommends that the board allows the applicants to provide additional evidence that the commercial activity is primarily a customer or supplier of farm use; and
  - That the program provides products and services that are essential to the practice of agriculture.
- The board must now make a decision on the remand; and
- Due to the 120-day limit from LUBA, the board has the following options:
  - Make a decision today; or
  - Continue the hearing and decide no later than December 14, 2022:
    - The time limit does not allow for an open record period.

***Board discussion:***

- The board can continue the hearing until December 14, 2022, but a decision will need to be made at that time:
  - LUBA does not allow for any extensions;
  - Because it is a remand and not the initial evidentiary hearing, the 120-day deadline must be followed; and
  - The additional time would allow staff and legal to create findings and to prepare an order for the board to sign by the January 20, 2023 date.
- Ms. Vetto clarified that technically the board has the option to leave the record open and still meet the deadline:
  - It would be a push at the end.
- Staff's recommendation is to allow enough time to fully develop all the findings and other requirements by the January 20, 2023, deadline;
- If the board were to make a decision by December 14, 2022, staff would have more than one month to complete the required documents:
  - There are two holidays within that time period to be considered.

***Testimony:***

***Opposition:***

Andrew Mulkey, attorney for Friends of Marion County:

- Mr. Mulkey is signed up to testify via telephone in opposition of the request;
- It appears that the applicants need to submit additional evidence based on the hearings officer's recommendation:
  - The evidence submitted thus far is not adequate to meet the case standards; and
  - Opponents and participants in the proceedings have the right to respond if the applicant submits additional evidence.
- Friends of Marion County only received notice of the hearing on December 2, 2022:
  - This did not allow for sufficient time to prepare for the hearing.
- The findings and evidence are inadequate to show that there is no significant impact of the proposed use on nearby farms and farming operations:
  - The impacts discussed are in part traffic-based impacts; and
  - The evidence in the record as well the conditions do not show that the impacts are going to be insignificant.
- The conditions of approval limit the number of groups allowed on the property every week, but they do not limit the size of the groups:
  - They also do not limit the number of vehicles that are allowed; and
  - It is unknown what the traffic will be because the conditions do not address this.
- The applicants provided additional evidence related to Mr. Kirsch's farm operation and its relationship to the subject property:
  - It did not address any of the other activities that the applicants plan to conduct on the property, or show the relationship to farm use; and

- It does not show the connection to all the other activities that the applicants plan to undertake:
  - There is no connection provided for the following:
    - Greenhouses; or
    - Gardens.
- Classroom space is a concern;
- The applicants failed to meet their burden to clarify the actual relationship to farm uses; and
- The hearings officer's proposed findings are inadequate.

***Testimony:***

***Support:***

Michael Gelardi, attorney for the applicants:

- The case has been ongoing for two years;
- The hearings officer found that there is farm use on the property and there are no farm impacts issue;
- The opponents requested more evidence on Kirsch Enterprises farming and to what extent the purchase orders are for crops grown on the Jones' property versus other Kirsch properties:
  - The applicants submitted evidence this morning;
  - Evidence shows that Kirsch Enterprises has several different farms where he is growing the same crop that is growing on the Jones' property; and
  - The evidence shows that the farms are productive, which further supports the fact that there is a legitimate farm use, and that there is a real benefit to the property being in farm use:
    - The property would not be in farm use if the Joneses had not purchased it out of bankruptcy and restored it.
- Mr. Gelardi expressed that the hearings officer said that the applicants have not produced enough evidence to show that the program is a supplier of farm uses:
  - Local code criteria says that the commercial activity has to be primarily a customer or a supplier; and
  - The applicants are not contending that they are primarily a supplier under the standard because of the decision that LUBA made:
    - He expressed LUBA's idea that farm education produces farmers, and therefore you are a supplier, is speculative; and
    - He disagrees with LUBA's decision but understands that the decision must be followed.
- The applicants are not trying to show compliance under the supplier avenue;
- The applicants are saying that the program is primarily a customer of farm uses:
  - The applicants have produced additional evidence to support this.

- He feels the hearings officer's suggestion for more evidence about the supplier standard is misplaced; and
- Mr. Gelardi feels that the facts are there for the board to make a legal conclusion with strong findings to support the conclusion.

***Board discussion:***

- Commissioner Willis requested that Mr. Gelardi talk about the issue of being a customer of farm use, as his understanding is that it has to do with the educational idea and helping to get kids into farming:
  - Mr. Gelardi responded with the following:
    - The customer supplier standard was never intended to apply to a situation like this;
    - In this case you have a farm education, or farm experience program, that has to take place on a working farm as the setting for the program:
      - It has been demonstrated that it is a working farm;
      - The property is in commercial farm use;
      - The program revolves around teaching individuals about farming, including activities that are specifically connected to Mr. Kirsch's farm operation such as:
        - Nutrient and water management;
        - Pest identification;
        - Learning about the life cycle of crops grown on the property;
        - Learning how to determine crop quality; and
        - Weighing and measuring yields.
      - There are other elements of the program, including additional areas of the property where there will be greenhouses and a large garden area; and
      - There is also a riparian area by Champoeg Creek where nature walks will be held to educate students on the relationship between natural areas and farming, and how good stewardship of farmland helps to protect wildlife and preserve the environment.
    - The youth are the customer of farm use, including the specific farm use of Mr. Kirsch's farm operation, and the broader farm use in the local agricultural community; and
    - There are also crops being grown on nearby properties, such as pumpkins and gourds, that will be purchased and utilized in the program.
- Commissioner Bethell expressed that the customer verses supplier is relevant in this case;
- Commissioner Bethell asked Mr. Gelardi to explain his finding of a customer:
  - Mr. Gelardi responded with the following:
    - The standard is primarily a customer of farm uses;



- They would like to utilize the farm and the program for their work.
  - There is a new letter in the record from Mr. Kirsch as of this morning that says that he and the Joneses have been approached by multiple FFA chapters, and that he would like to be able to work with these students:
    - It was expressed that Mr. Kirsch feels that the students can help him with water and nutrient management, and pest identification, which are elements in the program.
  - There is evidence from individuals in the local farming community that states this kind of agricultural education is really needed; and
  - There are one or two farm businesses that expressed that this program may help to train and motivate individuals who want to come and work for their businesses.
- Commissioner Willis expressed that Mr. Gelardi keeps making a distinction between being a customer or a supplier of farm uses, but the code just says that the commercial activity must be primarily a customer or supplier of farm uses:
  - The hearings officer found that there was not enough evidence in the record to support that criteria; and
  - There is no distinction made between whether it is customer or supplier.
- Mr. Gelardi feels that there is enough commercial activity in the record to support a customer of farm use:
  - The applicants did produce additional evidence since the hearings officer's recommendation, and they have addressed it to the extent that it deals with the customer standard;
  - Potentially the applicants could produce more evidence, but it is not clear what evidence would really make a difference; and
  - Mr. Gelardi feels that this is primarily a legal issue, not a factual issue.
- The commissioners must make a decision based on the law and the facts;
- Mr. Gelardi expressed that the commissioners have some ability to interpret what the law means, and how it applies to this case:
  - There is no formula that states you need to have specific evidence in order to meet the standard; and
  - Mr. Gelardi does not know what additional evidence will make a difference.
- Commissioner Willis requested to talk about LUBA's response:
  - LUBA agreed that the fact that this is not something that has been done before precludes it from being a commercial activity:
    - LUBA said that there is no evidence that the agricultural entertainment experience will produce motivated and qualified farm workers; and
    - There is no direct connection between the program and a supply of agricultural workers.
- Mr. Gelardi expressed that the language that Commissioner Willis read from the findings was about the supplier half of the criteria:



- The applicants are conceding that LUBA's decision makes it impossible for them to meet that standard.
- Commissioner Willis asked Mr. Gelardi what evidence they have provided, or can provide, to show that the commercial activity is a customer of farm uses:
  - Mr. Gelardi addressed the customer issue expressing the following:
    - That the reason that LUBA said there is no evidence of a customer is because LUBA feels that the evidence is not strong enough to show that the property is in farm use;
    - The applicants have produced additional evidence to show that the property is in farm use:
      - This includes the evidence regarding Kirsch Enterprises farming of the property; and
      - The evidence of other crops that are going to be grown in a greenhouse:
        - This should satisfy LUBA's concern that there is no evidence.
- This morning the applicants submitted another letter from Mr. Kirsch that explains his purchase orders and where the crops that he grew came from:
  - Additional discussion is included regarding the particular activities of the program and how they relate to his farming.
- This morning the applicants also submitted a couple of additional 2022 purchase orders from Mr. Kirsch that show the entire picture of all of the farms that he grew wheat on;
- Ms. Vetto commented that she thinks that the reason the hearings officer and LUBA focused on the supplier side is because that is what the applicants brought:
  - It sounds like after the hearings officer issued her decision there was a new argument from the applicants stating that they are now a customer;
  - Ms. Vetto's concern is if there is not time to review and really assess the evidence, and if there is not time to have the opponent weigh in on it, then this case will come back to the board:
    - This may be something where the board wants to leave the record open, allowing time to really analyze what is essentially a new argument that was raised this morning.
- Commissioner Cameron expressed that Mr. Gelardi made a comment in the record about FFA students:
  - He feels that the FFA has a statistic that says what percentage of the students who are in the program go on and work in farm use and stay in the farming community; and
  - He would like to see the information that proves that there are careers that will come out from using the program.
- Mr. Gelardi responded with the following comments:
  - The applicants' position during the last round was that they were both a customer and a supplier:

- They were a customer because individuals are coming to the farm and being served by the farm;
  - They are also a supplier because they wanted to have as many ways to have this approved as possible because they felt that whatever they said would be opposed; and
  - Once LUBA's decision came out, the applicants dropped being a supplier:
    - This is in their materials, so it is not a new argument; and
    - The applicants have made the argument consistently through the remand since September.
- Commissioner Willis questioned why the applicants dropped the supplier argument:
  - It may be hard to prove with certainty that any student who comes and learns at the farm will grow up to be a farmer, but the applicants could do some statistical analysis that might show that FFA participants are more likely to be farmers than students who do not participate in FFA;
  - The board believes that getting youth into farming is important to continue farming in our community; and
  - LUBA's decision said that there was no evidence:
    - It was inquired as to why the applicants feel that they cannot provide any evidence:
      - Mr. Gelardi responded with the following comments:
        - The applicants are not saying that they cannot produce any evidence:
          - The way that LUBA phrased it to say that, is speculative. Agricultural education leads to farming and individuals going into farm careers makes it a difficult standard.
- Commissioner Bethell expressed that education is speculative:
  - She feels that the applicants can make this argument because in the last year there are many farmers who have watched this proceeding and said that they would love to be a part of the program;
  - It would be good to hear the perspective of a farmer in today's hearing; and
  - She would also like to know how many FFA participants become farmers.
- The applicants may be concerned that if they say they are both a customer and a supplier, they will be told the issue was already decided;
- The applicants can produce evidence if the board's position is that they feel it should be both:
  - The applicants can produce evidence to support both;
  - There were farmers in attendance at the first hearing before the hearings officer, that were in support of the program; and
  - That is in the record.

- Commissioner Willis clarified that when it comes to appellate courts, they get to decide what in the record they want to address, and what they do not want to address, and they get to interpret the law:
  - The applicant may feel that LUBA did not address the possibility of being both a customer and a supplier;
  - LUBA expressed that the applicants did not meet the criteria because they are not a supplier;
  - The applicant may want LUBA to address the possibility of being a customer;
  - The board cannot force LUBA to answer a question; and
  - LUBA decides what questions they are going to answer.
- The board wants to narrow the focus to whether or not the applicant is a customer:
  - If a decision goes back to an appeal with LUBA, then they will have to answer the question, because that is the question on appeal.
- Ms. Vetto believes that LUBA addresses the assignments of errors that the opponents raise;
- Commissioner Willis feels that the question for the board is whether or not they are going to leave the record open and ask for more evidence in the record:
  - He feels that the board should speak with staff to get their opinion.
- Reiterating information sent to her by Ms. Vetto, Commissioner Bethell expressed that the central issue for the board today is the third assignment of error:
  - That the commercial activity must primarily be a customer or supplier of farm use.
- Mr. Gelardi expressed that he is reacting to the decision that LUBA made:
  - He felt that it would be hard for the applicants to meet that standard;
  - Because there are two options, he felt that they would have a more straightforward case on the customer side; and
  - He felt that the board would interpret the students as being customers.
- The commissioners want to arrive at a decision that LUBA will be satisfied with;
- Commissioner Bethell expressed that people are not entering into farming because it may not be an affordable occupation;
- Commissioner Bethell wants to set this up for success today, possibly as both a customer and a supplier:
  - Further discussion may be needed so that the applicants have a solid decision.
- Commissioner Willis said that this is more like a policy question than a legal question, and he expressed the following:
  - The policy of EFU land in Oregon is that it is for farming;
  - The statutory and regulatory regime is set up to disincentivize individuals from doing things other than farming on EFU land;
  - When you are doing something other than farming, the scheme is set up to make sure that that the other thing is related to farming in a very intimate and subsidiary way;

- The primary purpose of EFU ground is to farm, so whatever else an individual is doing needs to be in the service of farming;
- The concern from individuals who view the land use as essential to preserving farming in Oregon and Marion County, is if this is not tightly regulated, then any farm could turn into a museum, a zoo, or something else;
- What LUBA is trying to do here is say that the applicants need to prove that the primary use of this parcel will continue to be farming:
  - That the farm experience program will be subsidiary to that primary use; and
  - That no one else will be able to look at this case and open a carnival next door because of the way these rules are written.
- The question is whether or not the applicants provided enough evidence to allow the board to say that the primary purpose of this parcel will continue to be farming:
  - That the experience that the youth will have is going to be subsidiary to the farming;
  - That this will not dramatically alter how farms are utilized in Marion County;
  - It also needs to not negatively impact other farms in the area;
  - Will this continue the system where EFU land is primarily used for farming;
  - Is it supportive of the overall uses;
  - Is there enough evidence in the record to yes; and
  - If it goes up for appeal, will LUBA have enough evidence for a decision.
- Mr. Gelardi expressed that Mr. Kirsch produced the following crops on the property:
  - A commercial wheat crop in 2020;
  - A red clover crop in 2021 that was harvested in 2022;
  - A commercial wheat crop in 2022; and
  - A red clover crop in the fall of 2022 for harvest in 2023.
- The property is approximately 75 acres:
  - Approximately 35 acres is suitable for farming and field crops:
    - This acreage is being farmed by Mr. Kirsch.
  - Most of the rest of the property is a riparian area:
    - It is a natural area that cannot be farmed due to environmental regulations and because it is not suitable for farming.
  - Historically, the property was a nursery business:
    - All the land that can be commercially farmed is being farmed; and
    - There is a large gravel area that will become the location for greenhouses and a garden area.

*(Video Time 01:53:01)*

***Recessed at 10:53 a.m.***  
***Reconvened at 10:56 a.m.***

*(Video Time 01:53:16)*

The applicants, Jeff, and Heidi Jones, signed up to comment, but chose not to.

***Testimony:***

***Opposition:***

Roger Kaye:

- Mr. Kaye distributed a letter to the commissioners;
- Mr. Kaye is president of the Friends of Marion County:
  - Friends of Marion County is an independent farmland protection organization founded in 1998; and
  - Their mission is to protect farm and forestland, and open space in Marion County.
- The organization opposes the application and request is denial for the Conditional Use (CU) to establish a farm experience program for youth and families as a commercial activity in conjunction with farm use;
- Mr. Kaye expressed that the applicants stated that they submitted evidence at the beginning before the LUBA hearing:
  - LUBA found that the applicants did not provide any information, and the county had not received it from the applicants;
  - The applicants wrongly assigned blame to Marion County for omitting the documentation; and
  - The applicants had ample opportunity to object to the record, and by not doing so they forfeit their right to argue the point in their LUBA remand request:
    - Friends of Marion County objects to any of the information that was entered into the record to the hearings officer and admitted at the date of the hearing.
- Mr. Kaye addressed concerns related to the lease agreement and the payments made from the lessee to the lessor:
  - The amount of money earned by the lessor is only attributable to the lease agreement:
    - \$100 per acre:
      - For 35 acres the amount totals \$3,500.
    - The proposal is not subordinate to the farm operation:
      - If the applicant is allowed to enlarge the program to where it becomes larger than the farming operation, it means the applicant's proposed use is not subordinate or a major income contributor to the operation on the farm; and

- No more than 50 percent can be attributed to the proposed use because it would then be the predominant income earner to the property, and not subordinate to the farm operation.

***Board discussion:***

- Commissioner Cameron requested that Mr. Kaye clarify that he is just referring to the lease and not to the gross amount that is the result of the farm operation that is producing the product that is leasing the ground:
  - Mr. Kaye expressed that the only funds available to the applicants are the lease funds paid by the lessee to the lessor.
- Commissioner Cameron clarified that the farm operation is producing more than \$3,500 on the acreage:
  - Mr. Kaye expressed the following:
    - He does not know what the farm operation is producing;
    - They object to the introduction of information that was submitted by the applicants last night, as they did not have access to it: and
    - If the information is allowed to become part of the record, they need to have time to respond to it.
- Commissioner Cameron clarified that he is not referring to any documentation that was submitted last night:
  - He is just asking a question about the gross farm revenue off of the ground;
  - He will ask staff what the standard would be and what has been used in the past; and
  - If product is being produced from the land, then it is still considered farm operation regardless of who is farming the land.
- Mr. Kaye expressed that the applicant is providing income by membership or visiting fees to students coming onto the property:
  - This is the money that the applicants will be providing on the tax form and not the amount the Mr. Kirsch is obtaining from farming the crops.
- The Friends of Marion County object to the three working days notice of the hearing because it is insufficient by state law:
  - They were notified on Friday.
- The evidence is not sufficient to meet the customer or supplier requirement:
  - The applicants' programs and activities are not primarily a customer or supplier of farm uses; and
  - The applicants' activities are primarily intended to provide education, and they are not a customer of farm use.
- The applicants have failed to show that the proposed activities enhance the farming enterprises of the local agricultural community;
- The applicants have not demonstrated a connection between the majority of the proposed activities and construction, and a farm use:
  - The hearings officer's findings are inadequate to meet this condition.

- The applicants have failed to show that the products and services provided are essential to the practice of agriculture:
  - The hearings officer's findings are inadequate to meet this condition.
- A commercial activity in conjunction with farm use requires that the commercial activity be subordinate to the farm use:
  - The applicants are applying the court's decision on wineries to the educational program that is proposed; and
  - If the applicants' commercial activity exceeds the farm use in terms of income, effort, acreage, or any other relevant factor, then the commercial activity becomes the primary use of the property, and the farm use becomes subordinate:
    - The subordinate use cannot provide more than 50 percent of each of the relevant factors;
    - The county's limit of 25 percent of income is an appropriate measure to restrain the subordinate use from becoming the primary use; and
    - The hearings officer has not addressed this possibility in the analysis of income from the commercial activity, and the suggested conditions of approval do not address this possibility.
- Citing various decisions on wineries as they relate to the application, the commercial activity may not exceed 25 percent of the gross income from the onsite retail sale of wine produced in conjunction with the winery:
  - If the applicants rely on these court decisions to argue that this program should be permitted, then the applicants must be held to the same standard as permitted for a winery;
  - Because the maximum allowed earning from the commercial activity cannot be more than 25 percent of the gross income from the property owner's farm income, county staff is correct to limit the income for the commercial activity:
    - As noted above, the income from the farm to the applicants is the lease payment of \$3,500, which is the total amount the applicants are allowed to report on a tax document.
  - If the applicants' commercial activity far exceeds the farm use in terms of income, effort, acreage, or any other relevant factors, the subordinate use cannot provide more than 50 percent.
- Speaking to the educational program Mr. Kaye expressed the following:
  - There are many factors that go into the process of becoming an adult and choosing a profession:
    - A trip to a museum does not create a visual artist, a trip to a movie theater or stage play does not create an actor, a trip to a musical concert does not create a musician, and a trip to McMinnville does not create a pilot or astronaut;
    - Creating a temporary interest in a particular field of study does not create a practitioner of that occupation; and

- LUBA stated that a major flaw in the county's reasoning is that there is no evidence that the agricultural entertainment and educational experience that the program provides will produce motivated and qualified farm workers.

***Board discussion:***

- Commissioner Bethell expressed that she respectfully disagrees with Mr. Kaye's statement that exposure to a certain activity does not actually produce careers:
  - In Marion County there are two career technical education centers where students are exposed to 17 different industries, with the intention of giving the students access to a career path;
  - When a student is submersed in an activity through their education, they have the potential to be successful in that career;
  - Taxpayers in the county may feel career centers are important because they are funding career technical education centers;
  - The proposed program may be unorthodox to an EFU space, but its intent is to make sure that the county has farms so that people can be fed:
    - Providing access to youth so that they can be farmers in the future.
  - Career technical education is critically important to the workforces that are not seeking four-year college careers.

**Brandon Reich:**

- The argument today is clear, in the idea that students can be customers of an educational use:
  - The argument of students as customers can be made.
- There is a potential to provide additional evidence:
  - If the applicants are trying to establish this as a program where people come to their establishment to purchase further education, then they may provide the following:
    - A curriculum;
    - The classes that are going to be taught;
    - The degree or certificates that are going to be given;
    - The times of year classes will be offered;
    - An explanation of the education being provided that people may purchase as consumers; and
    - Consumers may only achieve this if they are on their farm because the farm has the aspects needed to provide those classes in that curriculum.
- There is a potential to provide some additional detail that may be convincing to LUBA:
  - The argument is there, but it is impossible to know how much evidence LUBA will want.



***Board discussion:***

- Commissioner Willis expressed that the applicants seem satisfied that they have submitted sufficient evidence to make that argument:
  - Mr. Reich responded that he thinks that there is adequate evidence to make the argument.
- Commissioner Bethell asked what evidence has been presented by the applicants for the customer piece, as she is trying to get to children as customers because they are purchasing an education:
  - Mr. Reich responded that in today's submittal there is evidence from Eric Kirsch that says that high school biology students and FFA members may be able to help him monitor soil and water conditions, and identify pests:
    - This indicates to Mr. Reich that students can do classes in identifying pests, how to monitor soil or water and moisture conditions, and how to apply pesticides and fertilizer.
  - Mr. Reich thinks that additional information could be added regarding the classes, the curriculum, who the program expects to attract, and what can be offered as a certificate.
- Commissioner Bethell expressed that she wants to understand what the education component is going to be:
  - More education details would help.
- Commissioner Cameron commented that if you have FFA students involved in the program, that are getting educated on the topics previously listed, the program will produce individuals who are going to stay in the agricultural business:
  - Somewhere there is a statistic that shows that FFA students are more likely to go on to be farmers; and
  - The students that do not go on to become farmers will have a better appreciation of what farmers are doing, and they will gain respect for the farming industry.
- Commissioner Bethell Googled how many FFA students continue in farming:
  - In Oregon there are currently 15,043 students in FFA, and 67 percent engage and continue in farming.
- Commissioner Bethell asked Mr. Reich if the record had enough evidence to support the customer component:
  - Mr. Reich expressed that there is evidence of the connection, and the argument can be made:
    - He feels that providing more detail may prove beneficial as the case proceeds.
- Commissioner Bethell acknowledged for the record that Mr. Kaye did state that his attorney would like to provide additional comment because of the information that was provided by the applicants today on the record;
- Additional time would give the applicants a chance to document some of the facts that have been mentioned; and

- Mr. Reich commented that if the record and hearing are left open until next week, the applicant has to agree to not request additional time for argument, because the case is out of time.

***Testimony:***

***Support:***

Michael Gelardi, attorney for the applicants:

- The applicants are open to allowing additional evidence, but they would ask that that evidence be limited to the issue of customer supplier:
  - They would ask that no one can introduce evidence about other things or raise new issues.
- Ms. Vetto expressed that the request is fair.

***Board discussion:***

- Mr. Reich said that if the board made a decision next week the following would occur:
  - If the board approves it, staff can work with the applicants' representative to get the order prepared; and
  - If the board does not approve it, staff will work to get that order prepared.
- If the applicants want additional time for their final argument, that would go until December 21, 2022:
  - The board would have to meet on January 4, 2023, to make the decision, and then staff would have limited time to prepare the required order; and
  - The county is asking the applicants to waive their final argument time.
- Another option is to close the hearing and record today, have final argument until next week, and then the board would reconvene on January 4, 2023;
- Commissioner Willis asked if the record could be held open for only a few days, because he is concerned that someone would submit something right before the hearing next week, and then the applicants or opposition do not have time to rebut it:
  - Holding the record open for only a few days would give people time to review additional information that is submitted.
- Mr. Reich responded that if the board leaves the record open at all, at some point the applicants have to be given seven days;
- Mr. Reich said that one option that counsel has suggested would be to leave the record open applicant, opponent, applicant, and then reconvene on January 4, 2023:
  - This option leaves limited time to write either an approval or a denial.
- If the record is left open until Monday, and the board reconvenes on Wednesday to finish this, there can be no new testimony at the hearing:
  - The applicants would have to agree not to have their full seven days after the record is closed to testimony from the opponents.
- Commissioner Willis asked if there is the possibility of the applicants agreeing to truncate their 7 days for rebuttal to 48 hours, from Monday until Wednesday:

- Mr. Reich explained that if the applicants agreed to this, then the record would be open for the applicants and the opponents until Monday, and then next Wednesday the applicants would have final argument only, no new evidence;
- Anyone would be able to submit onto the record until Monday;
- There would then be 48 hours to review the record; and
- Final arguments could be made on Wednesday.
- Mr. Gelardi is less concerned about arguments, and more concerned about evidence:
  - He does not want someone to drop in evidence at the last minute to where there is no opportunity to respond to the additional evidence.
- Ms. Vetto presented another option:
  - Under the statute the county could give the applicants seven days to present evidence, then the opponents would have seven days for rebuttal, then the applicants would have seven days for further rebuttal, and then the hearing would be held on January 4, 2023:
    - Because the 120 days goes to January 20, 2023, staff would only have two weeks to get the final order together:
      - Mr. Reich said that staff would make it work, but they would have limited time for both the internal work and working with the applicants.
- Mr. Reich suggested that the hearing could be continued until next week, and at that time the hearing and record would be closed, the board would make a decision, and staff would get to work on the order:
  - He is comfortable with this option as long as the evidence is limited to the question.
- Mr. Gelardi expressed that the applicants would be comfortable with this as long as the evidence is limited to the issue of customer and supplier:
  - It would be a one-week continuance; and
  - The hearing is continued only for the issue of customer and supplier.

*(Video Time 02:28:43)*

**MOTION:** Commissioner Willis moved to continue the public hearing one week to December 14, 2022, and leave the record open to accept additional evidence only regarding whether the educational program is a customer or a supplier of farm use. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.


Ms. King and Commissioner Bethell clarified that anything that needs to be provided to the board for Wednesday the 14th, needs to be submitted to Public Works staff by Tuesday the 13th by 5 p.m.


Commissioner Bethell commented for the record that the City of Keizer will be hosting the largest light parade in Oregon on Saturday:


- She encouraged public members to attend;
- River Road will close at 6 p.m.;
- The parade starts at 7 p.m.;
- More than 60 floats have entered the parade;
- There will be vendors along River Road; and
- The City of Keizer Chamber's website will have more information.

*(Video Time 02:31:57)*

Commissioner Bethell adjourned the meeting at 11:32 a.m.

  
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CHAIR

  
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COMMISSIONER

  
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COMMISSIONER

**Board Sessions can be viewed on-line at**  
<https://www.youtube.com/playlist?list=PLSUQ1gg6M78UsBE3q6w4rdf59Z5rXkEi5>