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Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of **T2-2021-14981** issued and mailed September 29, 2022. This notice is being mailed to those persons entitled to receive notice under MCC 39.1170(D).

The Hearings Officer's Decision is the County's final decision and may be appealed to the State of Oregon Land Use Board of Appeals (LUBA) by any person or organization that appeared and testified at the hearing, or by those who submitted written testimony into the record.

Appeal instructions and forms are available from:

Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, Oregon 97301

503-373-1265
www.oregon.gov/LUBA

For further information call the Multnomah County Land Use Planning Division at: 503-988-3043.

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DECISION OF THE HEARINGS OFFICER

An Appeal of the Denial of Applications for a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for Wildlife Habitat permit, Erosion & Sediment Control permit, and an exemption from the Geologic Hazards permit requirements.

Case File: T2-2021-14981

Applicant: Scott Reed

Property Owner(s) Scott and Nancy Reed

:

Address: 12424 NW Springville Road, Portland Map, Tax Lot: 1N1W16D -02800, 1N1W16D -03100, 1N1W15C -00600 Alternate Account #: R961160130, R961160590, R961150770 Property ID #: R324300, R324339, R501639

Base Zone: Exclusive Farm Use (EFU)

Overlay Significant Environmental Concern for wildlife habitat (SEC-h); Significant Environmental Concern for streams (SEC-s); Geologic Hazards (GH)

Site Size: 84.43 acres

Public Hearing: The hearing was opened at 9:00 a.m. on August 12, 2022. The hearing was held virtually.

Testified at the Hearing: Carol Johnson, Planning Director, David Blankfeld, Counsels office
Scott Reed, applicant
Garrett Stephenson, Applicant’s attorney

Post Hearing procedures: The record was kept open until August 26, 2022 for new evidence and then until September 2, 2022 for staff response and until September 16, 2022 for applicants final rebuttal.

Summary: The applicant is appealing the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that subject property qualifies for the following permits: a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for wildlife habitat, Erosion & Sediment Control, and an exemption from the Geologic Hazards permit.

Site Description



Applicable Approval Criteria:

General Provisions: MCC 39.1515 Code Compliance and Applications, MCC 39.2000 Definitions, MCC 39.3005 Lot of Record Generally, MCC 39.3070 Lot of Record EFU, MCC 39.3030 Lot of Record CFU-2, MCC 39.4210 Definitions EFU, MCC 39.6235 Stormwater Drainage Control, MCC 39.6850 Dark Sky Lighting Standards

Dwelling Customarily Provided in Conjunction with a Farm Use: MCC 39.4225(C) Review Uses Dwelling Customarily Provided in Conjunction with a Farm Use, MCC 39.4240 Single Family Dwelling Condition of Approval, MCC 39.4245(C), (D), (F), (H) Dimensional Requirements and Development Standards, Former MCC 39.4265(B)(3) (2021), repealed by Ordinance 1304 (2022) Standards for Specified Farm Dwellings Not high-value farmland soils, capable of producing the median level of annual gross sales.

Significant Environmental Concern (SEC-h): MCC 39.5510 Uses; SEC Permit Required, MCC 39.5520 Application for SEC Permit, MCC 39.5580 Nuisance Plant List, MCC 39.5860 Criteria for Approval of SEC-h

Permit Erosion and Sediment Control: MCC 39.6210 Permits Required, MCC 39.6225 Erosion and Sediment Control Permit Geologic Hazards Exemption: MCC 39.5075 Permits Required, MCC 39.5080 Exemptions

Geologic Hazards Exemption: MCC 39.5075 Permits Required, MCC 39.5080 Exemptions

DECISION: The appeal from the Administrative Decision finding that the evidence in the record does not sufficiently demonstrate that the subject property qualifies for the following permits: a Dwelling Customarily Provided in Conjunction with a Farm Use. The Hearings Officer finds that the Appellant did not meet his burden of proof regarding farm income required by former MCC 39.4265(3)(c) as described below. The Hearings Officer addressed the remaining approval criterion that staff found was not met in order to allow Appellant to address them on appeal or to provide guidance on a new application.

The hearings officer's decision is supported by the following findings.

Dated this 29th day of September 2022

Alan A Rappleyea

Alan A. Rappleyea
Multnomah County Land Use Hearings Officer

This Decision is final when mailed. Appeals may be filed with the Oregon Land Use Board of Appeals within the time frames allowed by State law.

Case No. T2-2021-14981

A. HEARING AND RECORD HIGHLIGHTS

1. Multnomah County Land Use Hearings Officer Alan Rappleyea received testimony at the duly noticed public hearing about this application on August 12, 2022. At the hearing, the hearings officer reviewed the electronic record maintained by the Department of Community Services Land Use and Transportation Planning Program regarding the application. The hearings officer made the declarations required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts and any bias or conflicts of interest.

2. County Planning Director Carol Johnson summarized the Staff Report and the applicable approval criteria. Ms. Johnson described the conundrum the County was in regarding the application and the 180-day rule under ORS 251.427(4). The Hearings Officer is very familiar with this statute and the difficulty it can impose on staff. The staff must decide what to do regarding an application based on the record after 180 days. Here, staff opted to proceed with the application based on the information they had knowing that some information was missing. Staff acknowledged that a large amount of new information was submitted that they did not have previously. Reviewing this new information would be similar to reviewing a new application and Ms. Johnson stated that she expected that some of the new information will demonstrate compliance with some of the defects in the prior application.

3. Mr. Reed provided a very detailed description of the criteria and evidence that demonstrated that his application met those criteria. Mr. Reed expressed considerable frustration that staff did not reach out to him regarding what was lacking in his application. As stated above, the Hearings Officer is familiar with the procedural problems created by the 180-day rule and the bind it can put staff in when application materials come in late.

4. Unlike most land use hearings, the attorneys Mr. Blankfeld and Mr. Stephenson were mostly quiet and assisted on procedural issues.

5. After hearing all oral testimony, the hearings officer kept the record open as described above under “public hearing”.

6. After the hearing and submittals, staff reviewed applicant’s voluminous submittals and still found that criteria was not met. Mr. Reeds final submittal focused on the 10 issues that staff have with the application. This opinion will respond to the areas where the staff has found that the criteria was not met.

B. FINDINGS OF FACT

FINDINGS: See Below

The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Staff analysis and comments are identified as ‘**Staff:**’ and address the applicable criteria. Additional findings written by the hearings officer are preceded by the words “**Hearings Officer.**” The Hearings Officer adopt all of those findings of fact in the notice of decision, Exhibit C.6 as modified by Staff memo

Exhibit J.1. where staff found the criteria is met. The remaining criteria that staff believe are not met shall be addressed with specific findings below.

1.00 Project Description

Staff: Application for Approval of a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for wildlife habitat permit, and Erosion & Sediment Control permit. The request includes an exemption from the Geologic Hazards permit requirements. According to the proposed development plans, there will be no development within the CFU-2 zoned portion of TL 600 or the area(s) within the Significant Environmental concern for streams (SEC-s) overlay.

Proposed development includes a main building of [over] approximately 11,200 sq. ft. and multiple support structures. The support structures identified in the Applicant develop plan include a water quality facility, septic system, and access road / driveway / service corridor. The proposed development plans note that the total disturbance area is 2.44 acres, with approximately 16,860 sq. ft. (0.39 acres) of new impervious surface.

2.00 Project History

Staff: The subject tract is located in rural west unincorporated Multnomah County. The majority of the subject tract is zoned Exclusive Farm Use (EFU), with a portion of TL 600 zoned Commercial Forest Use 2 (CFU-2). A stream runs northeast from the southwest portion of TL 2800 to the northwest portion of TL 600, where the stream forks. At the fork, one prong runs northeast towards NW Springville Road and the other prong runs east towards NW Springville Road. According to County Aerial Imagery (2021), the subject tract contains two large outbuildings and assorted several smaller structures.

A previous land use case (case no. T2-2014-3377) for an approval of a Customary Farm Dwelling, Significant Environmental Concern for wildlife habitat permit, and Hillside Development permit [now referred to a “Geological Hazards”(GH)] expired on September 11, 2017. Land use case no. T2-2021-14768 affirmed that case no. T2-2014-3377 expired on September 11, 201

3.00 Public Comment

Staff: Staff mailed a notice of application and invitation to comment on the proposed application to the required parties per MCC 39.1105 (Exhibit C.4). Staff received public comments, noted below, during the 14-day comment period.

3.1 Christopher Foster, property owner located at 15400 NW McNamee Road, submitted a letter via email on April 15, 2022 (Exhibit D.1) Staff: Foster cites two Land Use Board of Appeals engaged test. As Foster notes, one of the purposes of the principally engaged test is to distinguish between [a] dwelling occupied by those principally engaged in farm use and [a] dwelling primarily used as a rural residence. Foster states that the appellant does not appear to pass the “principally engaged test.” and that the proposed building with a permit value of several million dollars, dwarfs the proposed farm use plan or purported profit return. Foster then notes that most would conclude the principal [proposed] land use is residential.

Staff addresses the approval criteria related to Foster in section 5.12.

3.2 Scott Reed submitted [via email] a letter from Louie Beovich, property owner located at 11525 NW Springville Road, on April 19, 2022 (Exhibit D.2) Staff: Beovich noted their support for the project. It does not correspond to any approval criteria. Comments noted.

3.3 Joe Hazel, property owner located at 12535 NW Springville Road, submitted an email on April 19, 2022 (Exhibit D.3) Staff: Hazel noted their support but does not correspond to any approval criteria. Comments noted.

3.4 Scott Reed submitted [via email] a letter from John and Linda Talbot, property owners located at 12421 NW Springville Road, on April 19, 2022 (Exhibit D.4). Staff any applicable approval criteria. Comments noted.

3.5 Scott Reed submitted [via email] a letter from Daniel and Judi Douglas, property owners located at 12455 NW Springville Road, on April 20, 2022 (Exhibit D.5) The Douglas' noted their approval of the project. It does not correspond to any applicable approval criteria. Comments noted.

3.6 Carol Chesarek, property owner located at 13300 NW Germantown Road, submitted a letter via email on April 21, 2022 (Exhibit D.6) Staff: Chesarek questioned if the applicant followed the proper procedures [for calculating annual gross sales] set forth in OAR 660-033-0135. Chesarek noted that it is unclear what indicator crops were included in the valuation, how the applicant calculated the annual gross. Chesarek also questioned the legitimacy of the egg sales claimed by the applicant, given the lack of advertisement, and licensing required for commercial sales. Chesarek disagreed that the applicant is principally engaged in a farm use due to principal employment at a development company.

Staff addresses s 5.8 5.10, and 5.12. 3.7

Raj Chinnakonda, community member, submitted an email on April 21, 2022 (Exhibit D.7) Case No. T2-2021-14981 Page 6 of 32 Staff: Chinnakonda provided pictures of water and soil run-off from the subject tract. They noted that the run-off has been a problem since landscaping work was conducted on the subject tract.

3.8 Jerry Grossnickle, chair of the Forest Park Neighborhood Association (FPNA), submitted a letter on behalf of the Forest Park Neighborhood Association via email on April 21, 2022 (Exhibit D.8) Staff: FPNA noted concerns about complying with the criteria of being “principally engaged in the farm use of the land” requirement. dwellings because the (s) have appellants have careers wholly unconnected with farming and their children are school age and so cannot be principally engaged in farming. FNPA notes that it appears that the [proposed] principal engagement with the land is developing a rural residence 215.203.

Staff addressed the approval criteria related 5.12 of this decision.

3.9 Audrey Yoo, community member, provided an email on April 21, 2022 (Exhibit D.9) Staff: Yoo noted their concerns with the loss of wildlife habitat that would result from approving the application.

Staff addressed the applicable approval criteria for a Significant Environmental Concern for wildlife habitat permit in sections 6.1 6.13.

3.91 Christopher H. Foster. Mr. Foster argues that the Applicant has yet to satisfy their burden of proof with regard to MCC 39.4265(B) (3) (f) or its underlying OAR: 660-33- 0135 (1) (c) which states the dwelling be occupied by a person “principally engaged in farm use of the land” and that the

requirement of an established “farm use” be proved. Mr. Foster attaches an article that states that Mr. Reed was involved in a large housing project in Massachusetts dated August 2022.

Hearing Officer: Will respond to this argument below.

Hearing Officer: The Hearings Officer did not receive any public comments at the hearing other than the applicant and staff testimony. The Hearings Officer attempted to contact Ms. Jesse Winterout during the hearing but was unable to establish a connection with her.

4.00 Code Compliance and Applications Criteria:

4.1. Staff: Except as provided in subsection (A), the County shall not make a land use decision approving development, including land divisions and property line adjustments, or issue a building permit for any property that is not in full compliance with all applicable provisions of the Multnomah County Zoning Code and/or any permit approvals previously issued by the County. * * * Staff: Public comments (Exhibit D.7) suggest potential code violations including, but not limited to, Erosion and Sediment Control requirements. In the September 8, 2021 Incomplete Letter (Exhibit C.1), staff identified potential code violations related to previous development within the Significant Environmental Concern for stream (SEC-s) overlay. However, as the County is unable to approve the requested development at this time, staff has not addressed potential code violations on the subject property.

Hearings Officer: The Hearing Officer finds that staff provided no further information as to whether there are any current land use violations on the property. As such, the Hearings Officer finds that this criterion is met.

4.2. MCC 39.6235 STORMWATER DRAINAGE CONTROL

- (A) Persons creating new or replacing existing impervious surfaces exceeding 500 square feet shall install a stormwater drainage system as provided in this section. This subsection (A) does not apply to shingle or roof replacement on lawful structures.
- (B) The provisions of this section are in addition to and not in lieu of any other provision of the code regulating stormwater or its drainage and other impacts and effects, including but not limited to regulation thereof in the SEC overlay.
- (C) The provisions of this section are in addition to and not in lieu of stormwater and drainage requirements in the Multnomah County Road Rules and Design and Construction Manual, including those requirements relating to impervious surfaces and proposals to discharge stormwater onto a county right-of-way.
- (D) The stormwater drainage system required in subsection (A) shall be designed to ensure that the rate of runoff for the 10-year 24- hour storm event is no greater than that which existed prior to development at the property line or point of discharge into a water body.

(E) At a minimum, to establish satisfaction of the standards in this section and all other applicable stormwater-related regulations in this code, the following information must be provided to the planning director:

- (1) A site plan drawn to scale, showing the property line locations, ground topography (contours), boundaries of all ground disturbing activities, roads and driveways, existing and proposed structures and buildings, existing and proposed sanitary tank and drainfields (primary and reserve), location of stormwater disposal, trees and vegetation proposed for both removal and planting and an outline of wooded areas, water bodies and existing drywells;
- (2) Documentation establishing approval of any new stormwater surcharges to a sanitary drainfield by the City of Portland Sanitarian and/or any other agency authorized to review waste disposal systems;
- (3) Certified statement, and supporting information and documentation, by an Oregon licensed Professional Engineer that the proposed or existing stormwater drainage system satisfies all standards set forth in this section and all other stormwater drainage system standards in this code; and
- (4) Any other report, information, plan, certification or documentation necessary to establish satisfaction of all standards set forth in this section and all other applicable stormwater-related regulations in this code, such as, but not limited to, analyses and explanations of soil characteristics, engineering solutions, and proposed stream and upland environmental protection measures.

Staff: According to the Stormwater Certificate, which lists Erik Esparza as the Professional Engineer (Exhibit A.23), the proposal requires the construction of an on-site storm water drainage control systems, However, Erik Esparza’s signature is not included in the signature block and the applicant did not provide the supporting documents dated February 12, 2022 (signed site plan, signed storm water system details, or the stamped and signed calculations) referenced on the Stormwater Certificate. Case No. T2-2021-14981 Page 9 of 32 As noted in section 5.3 below, the applicant declined to submit a current Septic Review Certification for the proposal. The 2017 Septic Review Certification (Exhibit A.4) shows the water quality (storm water) facility in a different location. Based on the above, staff is unable to find that the proposal complies with MCC 39.6235. Criteria not met.

Appellant: Appellant responded to the staff statement above in its post hearing submittal.

“LUP and Chris Liu did receive signed and stamped site plans and storm water plans on February 14, 2022. This fact can be confirmed three different ways.

1. The Gmail account of Springwood Acres Farm archived an email to Chris Liu with the signed plans on February 14, 2022. The email included seven attachments. The sixth attachment was “C-

Site Plan_2-12-2022.pdf”. See Exhibit E-Stamped & Signed Plans for a screenshot of the site plan cover page with Erik Esparza’s stamp and signature (all other plan pages are stamped and signed as well).

2. The LUP has all the exhibits for this application on the link <https://www.multco.us/landuse/12424-nw-springville-road-hearing-1>. LUP Exhibit A.16 – Site and Access Plan clearly shows the stamped and signed plans.

3. In the June 14, 2022 Notice of Decision, on page 18 LUP shows a screenshot of one sheet the site plan. On the screenshot, the stamp and signature of Erik Esparza is clearly on the site plan.

In case Chris Liu needs to see these documents again, all the referenced documents have been resent to LUP via a Dropbox link along with this appeal presentation.

If signatures were missing from any plans submitted on February 14, 2022, Chris Liu should have sent the Reeds an incomplete letter within 30 days of receiving the site plans or simply asked for revised plan to be sent to him.

As noted in section 5.3 below, the applicant declined to submit a current Septic Review Certification for the proposal. The 2017 Septic Review Certification (Exhibit A.4) shows the water quality (storm water) facility in a different location.

The Reeds never “declined to submit a current Septic Review Certification.” Scott Reed asked Chris Liu over the phone and via email multiple times if LUP had reviewed the site plan. Scott Reed needed to make sure that LUP was comfortable with the site plan because the City of Portland’s Bureau of Development Services requires a site plan as part of the Septic Evaluation Application. Scott Reed requested Chris Liu’s feedback again on March 11, 2022 via email regarding the site plan asking, “could you look at the site plan and see if it looks good enough to send to the fire and septic folks?” Chris Liu never replied to the question. Scott Reed completed the septic application with the site plan provided to LUP. The new septic approval is included in Exhibit F-Approved Septic Plan.

All storm water documents are stamped and signed by a registered engineer (see Exhibit P-Stormwater Certification & Exhibit Q-Stormwater Calculations). A current Septic Review Certification is included in the record (see Exhibit F-Approved Septic Plan). Criteria are met.”

Staff Responded:

In section 4.3, County Staff identified the need for additional information to address portions of the Code relative to Stormwater Drainage Control. Staff amends and replaces their findings in the Decision for the following sections: Section 4.3: A current Septic Review Certification completed August 11, 2022 is included as Exhibit H.2.f. A current, signed and stamped Stormwater Certificate is included as Exhibit H.2.p. A Stamped and signed [Stormwater] calculations document is included as Exhibit H.2.q.

According to the Stormwater Certificate, which lists Erik Esparza as the Professional Engineer, the proposal requires the construction of an on-site storm water drainage control system. The Stormwater Certificate references supporting documents (signed site plan, signed storm water system details, and stamped and signed calculations) dated February 12, 2022. In Exhibit H.3, p. 6 – 7, the Applicant notes that the site plan and drainage details are included in the preliminary development plans (Exhibit H.2.o). The ‘Site and Access Plan, p. C-401’ (Exhibit H.2.o, p.9) and ‘Drainage Details, p. C-603’ are dated January 2021. Exhibit H.2.o does not contain the signed site plan or the signed storm water system details dated February 12, 2022. Based on the above, Staff is unable to find that the proposal complies with MCC 39.6235. Criteria not met.

Appellants Final Response: Appellant responds with two arguments.

“As a general matter, the criteria for a principle farm dwelling are found in OAR 660-033-0135(2), which implements the allowance for a principle farm dwellings in ORS 215.283(1)(e). The criteria established by Land Conservation and Development Commission (“LCDC”) to implement the allowances in ORS 215.283(1) are exclusive; that is, the County may not add additional criteria or other restrictions not present in OAR 660-033-0135(2). This principle was clearly established in *Brentmar v. Jackson County*, 321 Or 481 (1995), and is explained as follows: “In conclusion, under ORS 215.213(1) and 215.283(1), a county may not enact or apply legislative criteria of its own that supplement those found in ORS 215.213(1) and 215.283(1).” *Id.* at 497.”

“Also, this is an application for the development of housing. Under ORS 197.307(4) and ORS 197.522(3), the County is required to apply only clear and objective standards and, where a condition is necessary to satisfy a standard, the County must consider application of a condition requiring such a Type I permit. The County need only find that compliance with such a condition is “possible.” *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009).”

Appellant argues that the standard in the code can only be applied as conditions and not as approval criteria.

Hearings Officer: The Hearings Officer finds that the Appellant is correct. *Brentmar* is still good law and the County is prohibited from applying legislative criteria of its own in addition to what is found in ORS 215.213(1). LUBA recently re-affirmed this rule in *Hendrickson v. Lane County* LUBA No.2021-117 (2022). The County can apply health and safety standards. *Josephine County v. Garnier*, 987 P.2d 1263, 163 Or. App. 333 (1999). The County can impose a condition requiring a signed site plan or the signed storm water system details and ensuring that MCC 39.6235 is met.

4.2: MCC 39.4245(F) On-Site Sewage.

Staff: A current Septic Review certification completed August 11, 2022 is included as Exhibit H.2.f. A current, signed and stamped Stormwater Certificate is included as Exhibit H.2.p. A Stamped and signed [Stormwater] calculations document is included as Exhibit H.2.q. The Applicant still needs to provide

the February 12, 2022 signed storm water system details referenced in the Stormwater Certificate (Exhibit H.2.p). Criteria not met.”

Hearings Officer: For the reasons cited above concerning the application of the *Brentmar* decision, the County cannot impose this as a denial criterion. It can be imposed as a condition.

5.00. Customary Farm Dwelling Criteria:

FORMER MCC 39.4265(B)(3) (2021), repealed by Ordinance 1304 (2022)

Staff amended and replaced their findings in the Decision with the sections below. Again, the Hearings Officer’s analysis will only be for those sections where the Staff found that the criteria was not met.

Staff:

“(c) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in subsection (b) of this section;”

“Section 5.10: The Applicant references purported income in Exhibit H.3, pp. 20 – 21. Staff is unable to confirm the farm related income until the Applicant provides certified copies of the 2020 and 2021 Schedule F forms. Certified copies of the Schedule F forms are key documentary evidence that would serve as the basis for a finding that the standard in this section is or is not met. “

Appellant:

“Please refer to the response above in section 5.8 for a complete explanation regarding how the applicant conducted the study to assert the median level of annual gross sales in Table 2. The Reeds can provide the County access to past years federal income tax Schedule F, as they have done in the past for the County under separate cover. Below is a summary of 2020.

In 2020 schedule F, Springwood Acres Farm LLC produced \$44,511 of farm income from egg sales (\$43,386) and Boer goat sales (\$1,125). The total pasture raised eggs produced was 93,299 (86,769 usable, 6,530 cracked/thin shelled) resulting in 7,231 dozen eggs sold.” Exhibit H.3. Page 17

“During the August 12, 2022 public hearing regarding the Appeal of Notice of Decision (T2-2021-14981), the Hearing Officer asked the Multnomah County LUP staff to provide a process by which Scott and Stacy Reed could submit their 2020 Schedule F income tax information to the County that it would not make private information posted to the internet. As of August 26, 2022 at 10:00 am PST the LUP staff has not communicated any submission process for the confidential tax information. The code section that is the subject of this appeal is MCC 39.4265, a “Farm Income Capable” test. Given that the

code standard is based on potential income, the proposed land use could be approved and occupancy could be conditioned on providing the 2020 Schedule F income tax information once LUP staff has figured out a secure way to transmit this information.” Exhibit I.2, page 2.

Hearings Officer: The Hearings Officer finds that this criterion is not met. The Appellants submittal stated that they would provide Tax form Schedule F to prove income. This has not been done. During the hearing, Appellant expressed legitimate concerns over privacy about having tax information on the web. The Hearings Officer asked staff if they could keep it off the web. Staff said “we can extract the number and keep it redacted.” They said they would keep it confidential to extent allowed under the public records laws. Appellant is incorrect as the Hearing Officer did not ask staff to develop a process. Staff never said they would get back to Appellant with a process. The Hearing Officer stated that this information was “crucial” for the decision. August 12, 2022, Hearing Tape at 1:53.

This issue was raised in the Notice of Decision, Exhibit C.6. page 15. Furthermore, staff had specifically requested “sales reports” and a Schedule F. Staff’s incomplete letter asked for:

“i. Annual Gross Sales: Your application materials did not include any supporting documents for the annual gross sales figures noted in your narrative. Please provide sales reports (i.e. monthly printouts from a payment system such as ‘Square’) and certified Schedule F form(s) from your federal tax return for the year(s) associated with the sales figures noted in your narrative. [MCC 39.4265(B)(3)(c)]” Exhibit C.1 Page 3.

In response to this letter and this section specifically, Appellant replied:

“4a(i). Annual Gross Sales- Please provide code section that requires the types of farm income information requested.” Exhibit C.3

The Hearings Officer finds that staff’s incomplete letter cited to the correct code section requiring income information. No response was needed. The only evidence in the record is the statements from Appellant found in Applicant’s Narrative Exhibit A.3, page 12. Applicant attached the findings from a previous application where staff found that the application could satisfy this criterion. Exhibit H.2.s. However, that was for a completely different type of farm use (dairy/ pigs) than proposed here so it has no relevance. Applicant states in the quote above that they have provided a Schedule F “as they have done in the past for the County under separate cover.” Unfortunately, the Hearings Officer cannot find any evidence in the record of the Schedule F or other sales report to verify the income. There is no other evidence to support the appellant’s assertion of farm income.

Staff citation *Friends of Marion County vs. Marion County* (2022) [LUBA No. 2021-088], is well taken. LUBA found that an applicant simply testifying to their [farm use] production or sales is not substantial evidence to support a conclusion affirming the farm use. Schedule F is a common tool counties use to verify income in Oregon. Here, it is not just a case of determining a “commercial farm” but there is specific dollar amounts that need to be earned. Again, the Hearing Officer stated that this

information was “crucial.” The Hearing Officer finds that the applicant did not meet his burden of proof demonstrating “annual gross sales.”

Next Appellant argues that the County can condition the demonstration of the proof of gross sales. Appellant is correct that the County Code mirrors the administrative rule.

“(g) If no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by subsection (c) of this section.” MCC 39.4265(f)

The Hearings Officer finds that this section is not applicable. This section is used for an applicant that has not begun a farm operation yet. Here we have an established farm use that should be able to produce definitive evidence through the submittal of its Schedule F.

Section 5.1: “(f) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale;”

Staff:

“The Applicant provided pictures of farming activities conducted on the subject property (Exhibit H.2.u). The Applicant states that they work 40 hours / week on the subject property and intend to give up “future apartments work” after moving into the requested Customary Farm Dwelling; the Applicant agrees with Staff that Stacy Reed works full-time as a dermatologist (Exhibit H.3, p. 23). An affidavit from the Applicant reiterates the Applicant’s aforementioned statements (Exhibit I.2). Additional factors that the Applicant believes serve as evidence of farming activity is that the Applicant was elected to the Multnomah County Farm bureau [a voluntary external position] and that 3.0 acres [of the 84.0 acres] will be dedicated to the residential use (Exhibit H.3, p. 24).

The Applicant relies on their testimony and pictures as the primary evidence to support a finding of their principal engagement in a farm use on the subject property. Without additional evidence, the Applicant’s testimony and pictures do not sufficiently demonstrate satisfaction of this standard. As mentioned in the Decision, documentary evidence [including certified copies of 2020 and 2021 Schedule F forms] is necessary to support a finding that the Applicant is principally engaged in a farm use of the land.

Appellants Response:

Principal Engagement in a Farm Use

“OAR 660-033-0135(2) requires that (F) “the dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the tract [...]” The qualifying phrase “will be” demonstrates that the “principally engaged” requirement looks to the future, not the past or the present; indeed, OAR 660- 033-0135(2)(G) provides that “[i]f no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by paragraph (C) of this subsection.” Therefore, the administrative rule (as well as the applicable County code) provides that a farm use may be established in the future based on a condition that an applicant demonstrate evidence of farm in the future.

Within this legislative context, the County’s position that Mr. Reed must submit a schedule F or demonstrate that he is currently principally engaged in farm use is wrong as a matter of law. Mr. Reed has submitted substantial evidence that demonstrates that (1) the property is being used for a farming and (2) he has attested in a signed affidavit that he is now (and will be in the future) principally engaged in farming activities on the property. He has explained that his real estate services company does not require him to work full or even half-time off the property and that he can conduct this business while still being principally engaged in the farm use.

Nothing more is required by the criteria, and even if it were, the County’s position that he must prove his stated commitment with a Schedule F at this point misconstrues the burden of proof in a land use application, which is a “preponderance of the evidence.” Mr. Reed has explained in detail his farm activity and how he spends the vast majority of the time engaged in that farm activity; this meets the “more likely than not” standard that the preponderance burden entails.

County staff is similarly wrong that Mr. Reed is not “principally engaged” in a farm activity because the majority of his income is derived from his real estate business. LUBA has been clear that the “principally engaged” test turns on time spent in relation to the demands of the particular farm activity, not on the amount of money earned. The best case on this language is *Aplin v. Deschutes County*, 69 Or LUBA 174 (2014). This case makes it clear that the “principally engaged” standard in OAR 660-033-0135 turns on the amount of time a person is capable of spending on the farming activity, not the relative percentage of income earned.

“We generally agree with petitioner that the "principally engaged" standard requires the applicant to submit, and the county to evaluate, evidence that, to the extent necessary, describes or quantifies the amount of time that the occupant of an accessory farm dwelling will be engaged in farm use of the property. Because the number of hours required on average each week for a person to be principally engaged in farm use will likely vary significantly from farm use to farm use the starting point will be to establish the average number of hours each week typically required for a full-time employee of the relevant farm use. A person "principally engaged" in that farm use must devote a similar number of hours, whether that person is also employed off the farm or not.” Emphasis added.

Aplin v. Deschutes County, 69 or LUBA at 181. Any contrary definition in the County code does not control because a “dwelling in conjunction with a farm use” is permitted in EFU zones under 215.283(1)(e), subject to ORS 215.279 and LCDC’s administrative rules. Under *Brentmar*, the County

cannot add a gloss on LUBA’s construction of the term “principally engaged” in ORS 660-033-0135 because a primary dwelling is a “subsection 1” farm use listed in ORS 215.283. It is also worth noting that Aplin concerned a dwelling for a full-time long-haul truck driver who could not possibly be principally engaged in a farm activity on the property. The Reed’s situation is much different. Mr. Reed has submitted substantial evidence that he is more often than not physically engaged in farming activities and intends to be so in the future, notwithstanding his remote work.

In summary, there is a preponderance of evidence in the record that Mr. Reed is now principally engaged in the ongoing farm activity. However, all Mr. Reed must demonstrate is that he will be principally engaged in a farm activity. If the Hearings Officer concludes otherwise, OAR 660-033-0135(F) and (G) allows the Reeds to prove up a farm use not yet established, and to the extent that the existence of that farm use determines their intention to be principally engaged in that farm use, such a showing can be a condition of approval.”

Public Comment (excerpts): Chesarek, Exhibit D.6.¹

“The applicant, Scott Reed, also doesn’t appear to be currently “principally engaged in the farm use of the land”. Scott Reed’s has a company, Reed Development Partners <https://reedcommunity.com/> which is engaged in development projects all over the United States. This language doesn’t allow for someone to start principally farming the land in the future, it requires current principal engagement in the farm use of the land.

The Narrative provided by the applicant (Exhibit A.x – Narrative with Applicable Code Sections, page 12) describes the sale of eggs as the principal current farm activity (there is no value put on the sale of any goats mentioned). It says that their hens produce 40,000 eggs per year which are collected, cleaned, inspected, packaged, refrigerated, and delivered each week to residential and commercial customers.

Oregon requires egg handling licenses for commercial egg sales. I searched for egg handling licenses for the Reed property on April 20, 2022. No Oregon Department of Agriculture egg handling license shows up under Springville Road or Springwood Acres, or under the name of Reed (screenshots are attached in an endnote³ . I am confused about how the Reeds can be legally selling their eggs to commercial buyers without this license.

I also couldn’t find any information advertising the Reed’s residential sales on Next Door, Facebook, Craig’s List, the TriCountyFarms or Local Harvest sites for finding fresh eggs/produce, or the Multnomah County Farm Bureau map of farm sales. There are no signs up on the periphery of the property advertising eggs for sale.

For a large scale egg operation, this appears odd and seems to undermine the argument that Scott Reed is “principally engaged in the farm use of the land” – if he was, we suspect that there would be an egg

¹ The Hearings Officer reviewed Exhibit D.2-5 letters in support of the application that did not reference any criteria.

handler's license associated with him or with his farm, and that I could figure out how to purchase some of those pasture raised eggs.

The Reeds have owned this property since 2014. If they were serious about farming, they could have established livestock and crops by now. They could have a mature orchard. The lot the home is planned for is zoned EFU. Given the size of the property, they could easily be earning enough farm income to qualify for a farm dwelling under other code sections today. Instead, they have brought in thousands of truckloads of fill (much of which was poor quality) over many years, built roads for the fill trucks, but only recently started actual farming on the property. It looks very much as if the relatively recent farming activity is simply being used to justify building an extremely large house with a view on valuable farmland, and I am concerned about whether any farming will continue after a dwelling permit has been granted by the county.”

Foster Exhibit D.1

“I would like to address just one important MCC code criteria: 39.4265(B) (3) (f) or its underlying OAR: 660-33-0135 (1) (c) which states the dwelling be occupied by a person “principally engaged in farm use of the land”. There are two relevant LUBA cases which establish a dual meaning of “principally engaged” that beg review in your decision making. Those cases are *Oregon Natural Desert Assoc. v. Harney County* 42 Or Luba 149 (5/14/2002) and *Alpin v Deschutes County* 69 Or Luba 174 (2014). In sum, I believe LUBA has determined the phrase means that a person must be principally engaged in farm use as opposed to some other occupation and that the land is principally engaged in farm use as opposed some other land use. I would propose that the Reed application may fail on both tests here.

In *Alpin V. Deschutes County* 69 Or Luba 174 (2014). at the second assignment of error (page 14) LUBA notes “One of the evident purposes of the principally engaged test is to distinguish between dwellings occupied by those principally engaged in farm use and dwellings primarily used as a rural residence”. In *Alpin*, LUBA finds the applicant fails the test or is not principally engaged in farm use, but rather is primarily a truck driver off the farm. In the *Springville Rd.* case before you, we have the Reeds both holding professional positions not related to farm use. My understanding is that Mr. Reed is the principal in a development company, Reed Community Partners and the Ms. Reed operates Reed Dermatology Northwest. I also believe that their children attend school full time. It would seem apparent that the family economic livelihood and time is principally non-farm and that none of the individual occupants is likely to satisfy the test.”

See also Exhibit I.1. from Mr. Foster

Forest Park Neighborhood Association Exhibit D.8

“We suggest that an application for a building permit for a farm dwelling at this site should be denied because it fails the fundamental requirement that the dwelling will be by occupied by persons “principally engaged in the farm use of the land”. The applicants have careers wholly unconnected with

farming, and their children are school-aged and can thus not be “principally engaged in the farm use of the land.” Their principal engagement must surely be school work. Their parents have not indicated that they intend to abandon their own careers to become “principally engaged” in farming the land. Rather, it would appear that their principal engagement with this land is developing a rural residence. Applicants have not suggested that they intend to build such a large house with so many bedrooms for the purpose of providing accommodations for farmworkers.”

Hearing Officer:

The Hearings Officer finds that Appellant complies with this standard. The County correctly asked for Schedule F as evidence. The Hearings Officer disagrees with Appellant that use of this evidence is not important. Schedule F would provide excellent evidence that Appellant was “principally engaged” as a farmer. Unlike the above criteria, where proof of income is necessary, under this criterion, Appellant only needs to prove that he is making a full-time effort to farm. An applicant could be a lousy farmer with very little income to show and still qualify under this section if they were working full time on the farm (but would likely fail other criteria).

Unlike the above standard where more objective proof is needed for income, the Hearings Officer believes that “principally engaged” can be more subjective. The Hearing Officer listened to the testimony of Appellant where he stated that “he is rarely off the farm” and that he “works forty hours of week on the farm” and finds this compelling testimony. Recording at 38:13. That along with photographic evidence of his efforts and the farm operation sway the Hearings Officer to conclude that Appellant meets this criterion.

Appellant also provided a sworn statement that he would be spending forty hours a week farming. Exhibit I.2. Contrary to this testimony we have statements concerning Mr. Reed’s business concerns and Mr. Fosters exhibit citing a press report about Mr. Reeds business in Massachusetts. Exhibit I.1. The implication is that the development work is his primary work. Mr. Reed acknowledges that he spends 20 hours a week on his business. That business likely makes more income than the farm. As stated above income is not as crucial to this standard as is effort. No other evidence is in the record that shows Mr. Reed is not on the farm doing farm work. Admittedly, this would be hard to come by.

The Hearing Officer reviewed the *Aplin* (not Alpin) case cited above. In that case, LUBA had strong evidence that as a truck driver, the applicant was not on the property so could not be doing farm work. There is no such evidence here.

Appellant states that the County cannot ask for additional evidence to meet this standard under *Brentmar*. The Hearing Officer disagrees and this evidence is directed to the statutory standard and does not add any additional criteria.

Ms. Chesarek raised concerns about the Appellant not have an egg handlers license. Appellant has submitted that into the record. Ms. Chesarek believes if the Appellant was farming, there would be more to show on the property. The Hearings Officer finds that Appellant just needs to show he is principally engaged in farming and does not have to prove that he is farming in the most profitable way.

Mr. Foster commented that the size of the dwelling is evidence that the Appellant is mainly using it for rural residential and not farming. As stated at the Hearing, the Hearings Officer does not believe the size of the dwelling is relevant to this criterion. Again, it is only the amount of labor that the Appellant puts for to determine whether he is principally engaged in farming.

This is a close matter, but the Hearing Officer believes Appellant has met his burden of proof and meets this criterion.

Section 6.00 (B)(22):

Staff:

“The August 10, 2022 Memorandum from the County Right-of-Way office regarding the Applicant’s request for a Transportation Planning review (Exhibit H.1, p.5 – 36), notes that additional information is needed to determine if the project creates a transportation impact (Exhibit H.1, p.6, Requirement no.3 and Exhibit H.1, p.14). Until the Applicant provides the County Right-of-Way office with the information needed to complete the Transportation Planning Review, and a completed Transportation Planning Review is available, staff is unable to find that this standard is met.”

Staff also submitted a memo from Jessica Berry, Transportation Planning & Development Manager Carol Johnson, Land Use Planning Director. Exhibit J.2

Appellant:

“Driveway Permit All the NW Springville Road driveways on the farm have been in use by the farm for the last 80+ years, except the newer driveway for the proposed dwelling which was installed five years ago under Multnomah County driveway permit number 80244. The newer driveway was sited and designed by Lancaster Engineering after a traffic study and site distance evaluation was performed. The Multnomah County Transportation Division lead for the driveway permit Eileen Cunningham (503-988-3582) was called 24 hours prior and given notice of the start of construction. The driveway was then built per the approved plans (Site & Access Plan, C-401) and inspected in person by a male driving a Multnomah County Transportation Division truck. The Reeds have been using the newer driveway daily for five years. The County regularly parks road maintenance and brushing clearing equipment on the new driveway. The Reeds considered the driveway permitted and installed. Eileen Cunningham has now left the County and her replacement (Graham Martin) in the Transportation Division cannot access Eileen’s notes/emails/call log from this project and he has demanded that we reapply for a permit for a driveway that has already been built and inspected.

In the interest of getting LUP approval for the proposed dwelling, the Reeds applied for a driveway permit for the five-year-old driveway. Then two days before the appeal hearing (after months of

review) the Transportation Division requires that the Reeds either close all the 80+ year old farm access points or apply for an Existing Non-Conforming Access or a Road Rules Variance.

Large farms, especially farms with a hilly topography, need multiple access points to manage operations and efficiently move livestock, feed, equipment, and other materials. Closing 80+ year old farm access points would make some parts of the Reed farm totally inaccessible to normal farm activities.

As noted in previous sections of this memo, the County may not deny an application for a primary farm dwelling if the criteria in OAR 660-033-0135(2) are satisfied. This is so regardless of whether the County will require a road rules variance to allow use of the proposed dwelling. Ms. Jessica Berry, Transportation and Development Manager, has stated that she would rather not wait until occupancy for this variance to be approved. However, there is no codified basis for this preference and triggering the requirement based on occupancy allow the County to approve the access points before the proposed dwelling is occupied. The problem with triggering the requirement on building permit issuance is that the County has demonstrated an inclination, even if not purposefully, of substantially delaying approval of building plans and by extension, permit issuance. Leaving to the County the ability to run the clock out on the approval for a road rules variance (even if one is required) is prejudicial to the Reeds and not necessary to ensure safe and adequate access consistent with the road rules. It is worth noting too that the County has approved the proposed access location as part of the prior principle farm dwelling (T2-2014-3377).”

Hearings Officer:

As discussed above, the County cannot include additional approval criteria on farm uses under *Brentmar*. However, the County can impose conditions that do not address farming or farm approval criteria but address health and safety concerns. The Hearing Officer finds that the conditions regarding access do not address farming but are to protect the traveling public and maintain the safe functioning of County roads.

“We do not read *Brentmar* to insulate uses described in ORS 215.213(1) and ORS 215.283(1) from all state and local government safety regulations. Simply because a school is located in an area zoned for exclusive farm use, for example, does not mean that the school building does not have to meet state and local fire, building and other public safety regulations that apply to all such buildings, regardless of their location.” *Josephine County v. Garnier*, 987 P.2d 1263, 163 Or. App. 333 (Or. App. 1999)

The staff has proposed a condition of approval concerning access in Exhibit J.2. Appellant takes issue with that for closing pre-existing driveways and the timing of when the condition must be fulfilled. The Hearings Officer finds that limiting access to County roads is a safety concern. The conditions provide that applicant can make an application for an Existing Non-Conforming Access code (MCRR 4.700) or a Road Rules Variance application (MCRR 16.000. This application should address Appellants

argument about the existing non-conforming access and the variance should be able to address arguments about the need for access for farm operations.

Hearings Officer is sympathetic to Appellants argument that the driveway that he has been using for 5 years was already permitted. Still, evidence needs to be in the record. The record shows that appellant has been obtaining the necessary permits. If this was a permit approval, the Hearings Officer would modify the recommended condition to allow the condition to be met before occupancy. This standard can be met with the imposition of conditions.

7.00 GH permit Criteria:

Staff:

“In section 7.1 – 7.2 of the Decision, County Staff identified the need for additional information to address portions of the Code relative to GH requirements.

Staff provides the comments below in addition to their findings in the Decision for the following sections:

Section 7.1: The Appellant provided a current Fire Service Agency Review (Exhibit H.2.n), which does not list any access road / driveway improvement requirements. An August 10, 2022 memorandum from the County Right-of-way office notes that paving will be required for the access and that additional information is needed to complete the Transportation Planning Review (Exhibit H.1, pp. 5 – 15).

Section 7.2: The Appellant references new documentation from an Oregon Licensed Professional Engineer to address this section (Exhibit H.3, p. 33). The new documentation (Exhibit H.2.m), must be reviewed by the HO to determine if the project qualifies for any relevant GH permit exemption(s) in MCC 39.5080. As noted in the Decision, the project does not qualify for the exemption listed in MCC 39.5080(N). If the project requires a GH permit, the HO is not able to grant a GH permit through the appeal process due to the fact that the Appellant did not include a GH permit in their application. The application subject to this appeal process specifically requested a GH permit exemption”. Exhibit J.1. pages 6-7.

Appellant:

“Geologic Hazards Permit. In the Notice of Decision (June 14, 2022), LUP Planner Chris Liu states that “as shown in the image above, a portion of the proposed development (access road/driveway) is within the mapped GH overlay.”

The image with the black star above is the entrance of the existing five-year-old driveway. This driveway is already built and used daily. There is no additional grading to install the driveway, although the County's ROW Department has requested "a new 20 ft wide asphalt approach to NW Springville Road". The ROW request would add approximately 1,700 square feet of asphalt paving or 10.493 yards of asphalt to the existing driveway. **The small portion of the existing driveway is the only portion of the proposed farm dwelling that is in the Geologic Hazard Overlay.**

The only potential work for this proposed dwelling that is in the Geologic Hazard Overlay is 10.493 yards of asphalt paving. Below is the County's Geologic Hazards code section (39.5070). Further below is the Exemptions (39.5080) which Section O exempts "Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces" from Geologic Hazard Permits.

5.B – GEOLOGIC HAZARDS (GH) § 39.5070- PURPOSES.

The purpose of this Subpart 5.B is to regulate ground disturbing activity within the Geologic Hazards Overlay in order to promote public health, safety and general welfare and to minimize the following risks potentially arising from ground disturbing activity or the establishment or replacement of impervious surfaces: public and private costs, expenses and losses; environmental harm; and human-caused erosion, sedimentation or landslides. (Ord. 1271, Amended, 03/14/2019) § 39.5080

EXEMPTIONS.

Ground disturbing activity occurring in association with the following uses is exempt from GH permit requirements: (O) Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces. (Ord. 1271, Amended, 03/14/2019)

Further, the criteria for a primary dwelling in conjunction with a farm use based on the soil income capability test are set forth in 660-033-0135(2). As noted above, under Brentmar, the County cannot add to or further restrict the approval criteria. A Geologic Hazards Permit requirement is not an approval criterion and is not reflected in OAR 660-033-0135, and therefore cannot be used as a basis for denial.

Also, this is an application for the development of housing. Under ORS 197.307(4) and ORS 197.522(3), the County is required to apply only clear and objective standards and, where a condition is necessary to satisfy a standard, the County must consider application of a condition requiring such a Type I permit. The County need only find that compliance with such a condition is "possible." *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009). The County must impose this condition in lieu of denial for these reasons." Exhibit K.1. page 6.

Hearings Officer:

The Hearing Officer finds that only limited area of the property is in the GH overlay zone. Part of that area is where the proposed driveway is located. The Hearings Officer finds that the previous driveway permit expired and new criteria has been adopted by the County. Exhibit H.1, page 5. Additionally, although work was done on the drive and it is currently being used, the conditions of the previous permit were not met as the required asphalt was not installed. Exhibit H.1, page 36.

Appellant believes that exemptions in MCC 39.5080 may apply. The Hearings Officer finds that the exemptions in subsection (N) do not apply because the property is located in the Tualatin River drainage.

Exemption (O) provides an exemption for: "Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces." The exemption for existing driveways (O), may apply. The Hearing Officer finds that the exemption for "existing driveways" only applies to existing driveway at the time the code was adopted or those lawfully permitted after the code was adopted. Appellant testified that the driveway is over 80 years old so it may apply. The exemption is only for "maintenance". It appears from the record that placement of asphalt on top of existing gravel without any other ground disturbance would qualify for exemption (O). Exhibit H.3, page 31.

If the application is refiled, and the access permit is reviewed and only asphalt is required over existing driveway, the Hearings Officer finds that Appellant may qualify for an exemption from the GH overlay.

8.00 Erosion and Sediment Control Permit

Staff:

"County Staff identified the need for additional information to address portions of the Code relative to ESC permit requirements.

As a general matter, the Applicant will need to revise the Erosion and Sediment Control (ESC) plan (Exhibit A.15), so that the ESC plan serves as the central document relative to ESC permit requirements. A detailed notes page should be added to address requirements of the most recent edition of the City of Portland Erosion and Sediment Control Manual, OAR 340-041-0345(4), and MCC 39.6225. Additional pages may be added to the ESC plan to address ESC requirements currently shown as details in other areas of the preliminary plans. A comprehensive, ESC specific plan is necessary to ensure that the ESC requirements are satisfied and the County ESC inspector can readily identify compliance when a project commences."

Appellant

"Erosion and Sediment Control Permit

The criteria for a primary dwelling in conjunction with a farm use based on the soil income capability test are set forth in 660-033-0135(2). As noted above, under Brentmar, the County cannot add to or

further restrict the approval criteria. An ESC Permit requirement is not an approval criterion and is not reflected in OAR 660-033-0135, and therefore cannot be used as a basis for denial.

Also, this is an application for the development of housing. Under ORS 197.307(4) and ORS 197.522(3), the County is required to apply only clear and objective standards and, where a condition is necessary to satisfy a standard, the County must consider application of a condition requiring such a Type I permit. The County need only find that compliance with such a condition is “possible.” *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009).

The County must impose this condition in lieu of denial for these reasons.”

Hearing Officer:

The Hearings Officer finds that the ESC is for health and safety, similar to grading permits and can be applied to this application. Typically, these standards are imposed based on engineering standards which are often clear and objective. The Hearings Officer is familiar with case law that in dicta indicates that clear and objective standards may need to be applied to housing outside the UGB. The Hearings Officers opinion is that when the courts do address this issue, they will find that this standard will not apply to farm dwellings outside the UGB. *See Warren v. Washington County*, LUBA No. 2018-089 (2018); 296 Or. App. 595, *cert. denied* 365 Or. 502 (2019).

The Hearings Officer finds that the County can impose conditions to require compliance with these criteria.

9.00 Exhibits

All exhibits are available for review in Case File T2-2021-14981, 12424 NW Springville Road
<https://www.multco.us/landuse/12424-nw-springville-road-hearing-1>

Or by contacting case planner, Lisa Estrin at 503-988-0167 or via email at lisa.m.estrin@multco.us.

[Exhibit C.6 - Notice of Decision 06.14.2022](#) (1.84 MB)

[Exhibit A.1 - General Application Form](#) (480.27 KB)

[Exhibit A.2 - Revised General Application Form](#) (457.98 KB)

[Exhibit A.3 - Applicant Narrative with Applicable Code Sections](#) (5.72 MB)

[Exhibit A.4 - August 2017 Septic Cert.](#) (1.54 MB)
[Exhibit A.5 - June 2018 Fire Service Agency Review](#) (1.44 MB)
[Exhibit A.6 - Preliminary Floor Plans](#) (18.65 MB)
[Exhibit A.7 - Preliminary Building Elevations](#) (16.32 MB)
[Exhibit A.8 - 2017 Declaration of Deed Restriction](#) (940.34 KB)
[Exhibit A.9 - 2017 Driveway Access Permit](#) (5.14 MB)
[Exhibit A.10 - 2017 Recorded Waiver](#) (395 KB)
[Exhibit A.11 - Development Plans - Full Set](#) (3.85 MB)
[Exhibit A.12 - 2018 Existing Conditions Survey](#) (318.73 KB)
[Exhibit A.13 - 2021 Existing Conditions Survey](#) (346.82 KB)
[Exhibit A.14 - Demolition Plan](#) (342.08 KB)
[Exhibit A.15 - ESC Plan and Details](#) (558.78 KB)
[Exhibit A.16 - Site and Access Plan](#) (308.4 KB)
[Exhibit A.17 - Driveway and Garage Profile](#) (460.18 KB)
[Exhibit A.18 - Grading Plans](#) (672.9 KB)
[Exhibit A.19 - Drainage Details](#) (203.02 KB)
[Exhibit A.20 - Farm Use Plan](#) (311.47 KB)
[Exhibit A.21 - February 2014 Farm Income Study](#) (19.27 MB)
[Exhibit A.22 - Certification of Water Service](#) (311.54 KB)
[Exhibit A.23 - February 2022 Stormwater Drainage Control Cert.](#) (104.08 KB)
[Exhibit A.24 - ESC Narrative](#) (128.56 KB)
[Exhibit A.25 - Updated Farm Management Plan](#) (73.89 KB)

[Exhibit B.1 - Property Detail R961160130](#) (338.25 KB)
[Exhibit B.2 - Property Detail R961160590](#) (331.19 KB)
[Exhibit B.3 - Property Detail R961150770](#) (149.09 KB)
[Exhibit B.4 - Tax Map for 1N1W16D](#) (156.28 KB)
[Exhibit B.5 - Tax Map for 1N1W15C](#) (74.36 KB)
[Exhibit B.6 - Former MCC 39.4265\(B\) \(2021\)](#) (34.03 KB)
[Exhibit B.7 - Copy of Website page from Reed Community Partners](#) (1.32 MB)
[Exhibit B.8 - Reed Realty Advisors Business Registration](#) (572.45 KB)
[Exhibit B.9 - Reed Dermatology Business Registration](#) (569.31 KB)
[Exhibit B.10 - Copy of ODA Food Safety License Search](#) (674.3 KB)

[Exhibit B.11 - MultCo Potential Gross Farm Sales Study](#) (1.13 MB)

[Exhibit B.12 - 2017 Ag Census - Multnomah](#) (953.06 KB)

[Exhibit C.1 - Incomplete Letter](#) (386.3 KB)

[Exhibit C.2 - Applicant's acceptance of 180 day clock](#) (173.36 KB)

[Exhibit C.3 - Applicant's response letter to County Incomplete Letter](#) (8.03 MB)

[Exhibit C.4 - Opportunity to Comment](#) (1.35 MB)

[Exhibit C.5 - OTC Website Attachments](#) (18.6 MB)

[Exhibit D.1 - Foster comments 4.15.2022](#) (165.07 KB)

[Exhibit D.2 - Beovich comments 4.19.2022](#) (185.8 KB)

[Exhibit D.3 - Hazel comments 4.19.22](#) (111.51 KB)

[Exhibit D.4 - Talbot comments 4.19.2022](#) (184.88 KB)

[Exhibit D.5 - Douglas comments 4.20.22](#) (412.42 KB)

[Exhibit D.6 - Chesarek comments 4.21.22](#) (4.88 MB)

[Exhibit D.7 - Chinnakonda comments 4.21.22](#) (3.13 MB)

[Exhibit D.8 - Forest Park Neighbor Assoc comments 4.21.2022](#) (162.19 KB)

[Exhibit D.9 - Yoo comments 4.21.22](#) (103.85 KB)

[Exhibit E.1 - T2-2021-14981 Notice of Appeal](#) (337.89 KB)

Multnomah County Exhibits

[Exhibit H.1 - T2-2021-14981 Conditions of Approval Memo - Multnomah County 08.12.2022](#) (5.78 MB)

Appellant Exhibits

[Exhibit H.2.a - Timeline - Appellant 08.12.2022](#) (248.32 KB)

[Exhibit H.2.b - Email Correspondence - Appellant 08.12.2022](#) (19.34 MB)

[Exhibit H.2.c - Application Fee Paid - Appellant 08.12.2022](#) (275.95 KB)

[Exhibit H.2.d - Applicant's Response - Appellant 08.12.2022](#) (169.46 KB)

[Exhibit H.2.e - Stamped and Signed Plans - Appellant 08.12.2022](#) (2.35 MB)

[Exhibit H.2.f - Approved Septic Plan - Appellant 08.12.2022](#) (5.12 MB)

[Exhibit H.2.g - Building Height Letter - Appellant 08.12.2022](#) (265.85 KB)

[Exhibit H.2.h - 1936 Farm Aerial - Appellant 08.12.2022](#) (722.5 KB)

[Exhibit H.2.i - Initial Incomplete Letter - Appellant 08.12.2022](#) (551.84 KB)
[Exhibit H.2.j - Traffic Impact Study - Appellant 08.12.2022](#) (508.54 KB)
[Exhibit H.2.k - Wildlife Conservation Plan - Appellant 08.12.2022](#) (2.51 MB)
[Exhibit H.2.l - Original Driveway ROW Permit - Appellant 08.12.2022](#) (5.18 MB)
[Exhibit H.2.m - Geologic Hazards Permit - Appellant 08.12.2022](#) (2.72 MB)
[Exhibit H.2.n - 2022 Fire Agency Review Form - Appellant 08.12.2022](#) (350.99 KB)
[Exhibit H.2.o - Site Plans - Appellant 08.12.2022](#) (3.9 MB)
[Exhibit H.2.p - Stormwater Certificate - Appellant 08.12.2022](#) (267.34 KB)
[Exhibit H.2.q - Stormwater Calculations - Appellant 08.12.2022](#) (3.49 MB)
[Exhibit H.2.r - Mult Co 2015 Findings of Fact - Appellant 08.12.2022](#) (7.5 MB)
[Exhibit H.2.s - 2015 Land Use Approval - Appellant 08.12.2022](#) (1.73 MB)
[Exhibit H.2.t - Mult Co Potential Farm Income - Appellant 08.12.2022](#) (1.92 MB)
[Exhibit H.2.u - Photo Proof of Farm Work - Appellant 08.12.2022](#) (49.55 MB)
[Exhibit H.3 - Applicant's Presentation 08.12.2022](#) (15.47 MB)

Post-Hearing Exhibits

[Exhibit I.1 - Letter - Christopher Foster 08.22.2022](#) (1.61 MB)
[Exhibit I.2 - Memos - Scott Reed 08.26.2022](#) (7.53 MB)

[Exhibit J.1. - T2-2021-14981 LUP Memo 09.02.2022](#) (473.56 KB)
[Exhibit J.2. - EP-2022-16021 Transportation Memo 09.01.2022](#) (97.43 KB)

[Exhibit K.1 - Post-Hearing Memo_T2-2021-14981_09-08-22](#) (1.72 MB)

