



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: November 7, 2018

Department: Public Works Agenda Planning Date: Nov. 1, 2018 Time required: 5 min.

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Consider an order denying Conditional Use (CU) Case 18-030/Lee.

Issue, Description & Background Conditional Use (CU) Case 18-030 is a request for a conditional use permit to establish a bed and breakfast inn as a home occupation on a 9.4-acre unit of land in a Special Agriculture zone at 3705 Ballyntyne Road South. On May 14, 2018, the planning director issued a decision approving the request subject to conditions. On May 23, 2018, that decision was appealed by property owners in the area that opposed the approval. The hearings officer conducted a public hearing on June 21, 2018, and on September 7, 2018, issued a decision denying the request. That decision was appealed to the board of commissioners who accepted the appeal and held a public hearing on October 17, 2018. After having considered all the information in the record the board denied the request. To complete the process a final order signed by the board is needed.

Financial Impacts: None.

Impacts to Department & External Agencies None.

Options for Consideration: 1. Approve the order as written. 2. Direct staff to make changes to the order. 3. Take no action at this time.

Recommendation: Staff recommends the board of commissioners approve the order as written.

List of attachments: Order Hearings officer's decision

Presenter: Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to: Joe Fennimore - gfennimore@co.marion.or.us

**BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY, OREGON**

In the Matter of the)
Application of)
Carol Lee)

Case No. CU18-030
Clerk's File No: 5780
Conditional Use

ORDER

This matter came before the Marion County Board of Commissioners at its regularly scheduled public meeting on November 7, 2018, to consider the application of Carol Lee for a conditional use permit to establish a bed and breakfast inn as a home occupation on a 9.4-acre unit of land in an SA (Special Agriculture) zone at 3705 Ballyntyne Road S, Salem, Marion County, Oregon (T8S, R3W, S18B, tax lot 500).

The planning director issued a decision on May 14, 2018, approving the request and that decision was appealed to the hearings officer who conducted a public hearing. The hearings officer issued a decision on September 7, 2018, to deny CU18-030, and this decision was appealed by the applicant. On September 24, 2018, the Marion County Board of Commissioners (Board) accepted the appeal and held a public hearing on October 17, 2018.

The Board, after having considered the Planning Division's and Clerk's files, Hearings Officer's decision, and the testimony and evidence in the record, makes the following Order:

IT IS HEREBY ORDERED that the Board adopts the Findings of Fact and Conclusion of Law contained in Exhibit A hereto and **DENIES** the conditional use application.

DATED at Salem, Oregon this _____ day of _____ 2018.

MARION COUNTY BOARD OF COMMISSIONERS

Chair

Commissioner

Commissioner

JUDICIAL NOTICE

Oregon Revised Statutes, Chapter 197.830, provides that land use decisions may be reviewed by the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days from the date this Order becomes final.

EXHIBIT A

Findings of Fact and Conclusions of Law

1. The subject property is designated Special Agriculture in the MCCP and zoned SA. The intent of the designation and zoning is to promote and protect commercial agricultural operations. The property is also within a sensitive groundwater overlay (SGO) zone, and partially within a geologically hazardous overlay zone.
2. The subject property is on the north side of Ballyntyne Road S, about 1,500' west of its intersection with Cobb Lane S. The property contains a dwelling, two wells, and a septic system. The property was created in its current configuration in property line adjustment case PLA 03-11 and is considered a legal parcel for land use purposes.
3. Properties north, west, south and southeast are zoned SA, and consist of small rural residential parcels and larger parcels in resource use. Properties to the east on the north side of Ballyntyne Road are zoned AR (Acreage Residential) and are in residential use.
4. Applicant asks for a conditional use permit to establish a bed and breakfast inn as a home occupation in the existing dwelling on the subject property.
5. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

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

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is a hair in applicant's favor, then the burden of proof is met and the application must be approved.

Marion County Code (MCC) 17.110.108 and 17.110.270

6. According to MCC 17.110.108 a bed and breakfast inn means:

A single-family dwelling where lodging and a morning meal for guests only are offered for compensation, having no more than five sleeping rooms for this purpose. An establishment where more than one meal per day is offered shall not be deemed a bed and breakfast inn. An establishment with more than five sleeping rooms shall be deemed a hotel. Unless specifically listed as a permitted or conditional use, a bed and breakfast inn is considered a home occupation. Weddings, receptions, group meetings, conferences and similar activities are not allowed as secondary uses, accessory uses or temporary uses in association with a bed and breakfast inn.

According to MCC 17.110.270 a home occupation means:

Any business or professional activity engaged in for production of income by a resident of a dwelling or dwelling unit as a subordinate use of the building and its premises, and in conformance with the provisions of this title. A home occupation may include a limited home occupation, conditional home occupation or a home occupation in a resource zone. Such term does not include the lease or rental of a dwelling unit or the rooming or boarding of persons on the same premises nor does it include a use meeting the standards of a home office in MCC 17.125 or a marijuana business licensed pursuant to applicable law.

At the public hearings neighbors argued that the proposed home occupation is not a subordinate use of the building and premises. Neighbors explained that the subject single family dwelling is atypical; describing it as 18,000 square feet and containing two apartments with kitchens, seven other bedrooms, a large commercial kitchen, single lane bowling alley, dance floor with bar, and indoor swimming pool and exercise room on nine acres fully landscaped with lawns and formal gardens, and having gated access. Neighbors stated concerns that the county cannot adequately monitor on-site activity to ensure compliance with regulations and conditions, and believe the use is likely to morph into a use more akin to hotel than a bed and breakfast inn.

In the written and oral testimony, applicant stated that the bed and breakfast inn will be operated by Ms. Lee in the existing dwelling. The dwelling contains seven bedrooms in addition to two separate apartments, and also has many amenities such as exercise room, swimming pool, dance hall and bowling alley.

Ms. Lee initially stated that the upstairs contains seven bedrooms, each with its own bathroom, and that five of these rooms would be used for the bed and breakfast. It would be advertised as a high end bed and breakfast. She later testified that she was not sure what the rents would be, nor was she sure which of the seven bedrooms would be used. In fact, she stated that each bedroom has its own character and that all seven bedrooms would be made available for guests to choose from. She indicated that she was planning to reside in one of the two

guest apartments in the house which contain a kitchen, bedroom and bathroom, and the guests would have access to all other areas of the house.

The board relies on the plain meaning of the code definition of bed and breakfast as being a place "where lodging and a morning meal for guests only are offered for compensation, having no more than five sleeping rooms for this purpose" and further that "[a]n establishment with more than five sleeping rooms shall be deemed a hotel." At the hearing the applicant requested that her guests have access to the dwelling amenities which include an exercise room, swimming pool, dance hall and bowling alley. As MCC 17.110.108 limits bed and breakfasts to offering lodging and morning meal, and having no more than five sleeping rooms, the criteria as to the number of rooms and available amenities for a conditional use as a bed and breakfast have not been met.

Marion County Code (MCC) 17.137.060(C)

7. Under MCC 17.137.060(C), notwithstanding MCC 17.110.270 and 17.120.075, home occupations, including the parking of vehicles in conjunction with the home occupation, including bed and breakfast inns, are subject to the following criteria:
 1. A home occupation or bed and breakfast shall be operated by a resident of the dwelling on the property on which the business is located. Including the residents, no more than five full-time or part-time persons shall work in the home occupation ("person" includes volunteer, nonresident employee, partner or any other person).
 2. It shall be operated substantially in:
 - a. The dwelling; or
 - b. Other buildings normally associated with uses permitted in the zone in which the property is located.
 3. It shall not unreasonably interfere with other uses permitted in the zone in which the property is located.
 4. A home occupation shall not be authorized in structures accessory to resource use on high-value farmland.
 5. A sign shall meet the standards in Chapter 17.191 MCC.
 6. The property, dwelling or other buildings shall not be used for assembly or dispatch of employees to other locations.
 7. Retail and wholesale sales that do not involve customers coming to the property, such as Internet, telephone or mail order off-site sales, and incidental sales related to the home occupation services being provided are

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

MCC 17.110.270 defines "home occupation" as "any business or professional activity engaged in for production of income by a resident of a dwelling or dwelling unit as a subordinate use of the building and its premises, and in conformance with the provisions of this title.

At the hearing before the hearings officer on June 21, 2018, Ms. Lee testified under oath that she was living on the subject property. At that time neighbors were skeptical of the claim, stating Ms. Lee has been seen on the property only once in six months of ownership. Ownership does not imply residency, and Ms. Lee listed a Lake Oswego address on the application form before it was crossed out and the Ballyntyne Road address added. When asked at the hearing before the board if she purchased this home as primary residence or second home she indicate that she bought it to use as a primary home. She went on to explain that she has a business in Portland and stays in the home in Lake Oswego a couple days a week. She was unable to recall when she moved into the house and when she had the address on her driver's license changed.

At the hearing before the board, neighbors once again testified that, since Ms. Lee had purchased the property, no persons other than landscapers have been observed on the property. Applicant acknowledged that she has not resided in the home until very recently.

Applicant stated she will reside in one of the apartments located within the dwelling when she opens her business. However, given the neighbors' testimony in conflict with Ms. Lee's testimony regarding how frequently she resides at the home in Salem, and the fact that Ms. Lee continues to own a home in Lake Oswego where she stated she stays for closer proximity to her Portland businesses, the board is not convinced that Ms. Lee has or actually will reside in the Salem home with any regularity. MCC 17.110.270 defines a "home occupation" as "*[a]ny business or professional activity engaged in for production of income by a resident of a dwelling or dwelling unit as a subordinate use of the building and its premise... ."* Applicant's residence in a guest apartment in the dwelling, while allowing guests full access to the balance of the 18,000 square foot home, is secondary to the proposed business activity. The board finds that the proposed use, as described by the applicant, is not subordinate to applicant's use of the dwelling premises as a residence. In addition, the board interprets the code to require that a home occupation must be operated by a current resident of a dwelling, not a future resident.

Based on the evidence in the record as a whole the board finds that the criterion in MCC 17.137.060(C)(1) required for a conditional use permit to establish a bed and breakfast inn as a home occupation is not met.

8. The dwelling is the only building on the property. The business shall be operated substantially in the dwelling. With this condition, MCC 17.137.060(C)(2) would be met.
9. MCC 17.137.020 through 137.050 lists more than 50 allowed, permitted subject to standards, and conditionally permitted uses in the SA zone. Uses range from agricultural and forest uses to nonfarm dwelling uses. This proposed use includes only five sleeping rooms with breakfasts and will take place primarily inside the dwelling, and no events. There will be no fireworks to frighten nearby horses or set the woodlands on fire, and no live bands to disturb nearby residential uses. At the hearing before the board, the applicant submitted information and testimony describing the day to day operation of the bed and breakfast. Based on the evidence in the record the use will not interfere with farm and forest practices with other uses permitted in the SA zone. MCC 17.137.060(C)(3) is satisfied.
10. The subject property is on high-value farm land, but no farm use is taking place on the subject property. Only one building is on the property, and it is not a farm structure. The use will not be conducted in farm-related structures. MCC 17.137.060(C)(4) is met.
11. MCC 17.191.065 (A) and (E) allow one unlighted wall, window or freestanding sign with no more than 32 square feet per street frontage (one Ballyntyne Road frontage), at no more than eight feet high. With these restrictions as conditions of any approval, MCC 17.137.060(C)(5) could be met.
12. The proposed use will take place entirely on the subject property. No assembly or dispatch of workers to other locations will take place. With this as a condition of approval, MCC 17.137.060(C)(6) can be met.
13. Customers will not be coming to the property for retail and wholesale product sales, only for a sleeping room and a morning meal. With a condition prohibiting retail and wholesale sales, MCC 17.137.060(C)(7) would be met.

MCC 17.137.060(A)

14. Under MCC 17.137.060(A), the following criteria apply to all conditional uses in the SA zone:
 1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest

dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.

2. Adequate fire protection and other rural services are or will be available when the use is established.
 3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
15. *Farm practices.* MCC 17.136.060(A)(1) incorporates OAR 660-033-0130(5) and ORS 215.196(1) requirements. ORS 215.196(1) as interpreted in *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), requires a three-part analysis to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require the county to consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

Surrounding lands is not defined in the MCC, but it makes sense to consider properties within the 750' notice area. The notice requirement presumes properties within that area might be affected by a proposed use. At the hearing before the board, the applicant submitted additional information and testimony describing farm and other uses taking place in the area. There is a Christmas tree farm and some forest management practices taking place in the area, however, since the use is primarily taking place inside the dwelling, the proposed use will not force a significant change in, or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. MCC 17.137.060(A)(1) is satisfied.

16. *Adequate services.* Utility lines are available to the subject property. Septic authorization will be required to ensure the current wastewater disposal system is adequate to support the proposed use. MCPW requested a 30' half width dedication along the subject property's Ballyntyne Road frontage within 180 days of any land use approval. The dedication is requested to ensure county local road right-of-way half width standards and adequate access can be met at the subject property. PW discussed the proposed condition with applicant and applicant stated

no objection to the right-of-way dedication at hearing. PW also commented that applicant's current driveway apron is not built to PW standards, but because roadway improvement is not imminent, PW decided it could require a removal agreement for the apron in lieu of present improvements. The permit process will ensure adequate driveway access to the public right-of-way. A condition can also require applicant to submit proof to the Planning Division that Salem Fire District approved a site access and identification plan prior to building permit issue. With conditions requiring frontage dedication, driveway permitting, fire district access and premises identification compliance, and septic authorization, adequate services are or will be available upon development. MCC 17.137.060(A)(2) can be met.

17. *Significant adverse impact.* The site is not within an MCCP identified peripheral or major big game habitat area, or near MCCP identified sensitive rivers, streams or headwaters. No MCCP identified wetlands are on or near the property. No MCCP identified watershed areas are nearby. The subject property is not in a floodplain overlay zone. The very northwest corner of the property is within a geologically hazardous overlay zone, but no earthwork or other development is proposed in the geo-hazard zone or elsewhere on the property. A septic authorization will be required as a condition of any approval to help protect water quality. No serious air emissions are associated with providing an overnight room and morning meal.

The subject property is within an SGO zone and the Oregon Water Resources Department (OWRD) South Salem Hills Groundwater Limited Area (GLA) described in OAR 690-502-0200 at exhibit 11. SGO requirements are not triggered by this application, but under OAR 690-502-0200(1), groundwater within the basalt aquifer in the South Salem Hills GLA is classified for exempt uses, irrigation and rural residential fire protection systems only. Opponents claim applicants are violating exempt use laws, specifically ORS 537.545(1)(b).

Under ORS 537.545(1), no registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under ORS 537.505 to 537.795 and 537.992 is required for the use of ground water for:

- (a) Stockwatering purposes;
- (b) Watering any lawn or noncommercial garden not exceeding one-half acre in area;
- (c) Watering the lawns, grounds and fields not exceeding 10 acres in area of schools located within a critical ground water area established pursuant to ORS 537.730 to 537.740;
- (d) Single or group domestic purposes in an amount not exceeding 15,000 gallons a day;

- (e) Down-hole heat exchange purposes;
- (f) Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day; or
- (g) Land application, so long as the ground water:
 - (A) Has first been appropriated and used under a permit or certificate issued under ORS 537.625 or 537.630 for a water right issued for industrial purposes or a water right authorizing use of water for confined animal feeding purposes;
 - (B) Is reused for irrigation purposes and the period of irrigation is a period during which the reused water has never been discharged to the waters of the state; and
 - (C) Is applied pursuant to a permit issued by the Department of Environmental Quality or the State Department of Agriculture under either ORS 468B.050 to construct and operate a disposal system or ORS 468B.215 to operate a confined animal feeding operation.

Testimony from neighbors indicates that the 9.4-acre parcel, except for impervious surfaces, is in lawn and formal gardens watered by a system supplied from two exempt water wells, amounting to several watered acres. The estate grounds can be seen in aerial photos in the record. Multiple water wells do not allow increased volumes for exempt uses. It is not definitive that wells on the subject property tap the basalt aquifer, but opponents have sufficiently raised the issue of adherence to state water law, implicating MCC 17.110.680:

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

A condition of approval could require applicant to provide proof from OWRD that applicant is in full compliance with Oregon water use laws and regulations. This could satisfy MCC 17.110.680, and help ensure groundwater resources are protected. If conditions of approval are met, the proposed use would have no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality and MCC 137.060(A)(3) would be met.

18. *Noise*. Requiring compliance with MCC 8.45 noise standards, and prohibiting events and activities on the property can be made conditions of any approval. With these conditions, the use will not generate disturbing noise, and MCC 17.136.060(A)(4) could be satisfied.
19. *Water impounds/mineral and aggregate sites*. No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.137.060(A)(5) is satisfied.

Conclusion

20. The proposal fails to meet the definition of a home occupation in MCC 17.110.270 and the applicant failed to meet the burden of proving applicable standards and criteria for approval of a conditional use application to establish a bed and breakfast inn as a home occupation on a 9.4-acre property in the SA zone have been met.

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. CU 18-030
Application of:) Clerk's File No.
CAROL LEE) **Conditional Use**

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Carol Lee for a conditional use permit to establish a bed and breakfast inn as a home occupation on a 9.4-acre unit of land in an SA (Special Agriculture) zone at 3705 Ballyntyne Road S, Salem, Marion County, Oregon (T8S, R3W, S18B, tax lot 500).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.119 and 17.137.

III. Public Hearing

A public hearing was held on this matter on June 21, 2018. The Planning Division file was made part of the record. The record was left open for opponents until June 28, 2018, and until July 5, 2018 for applicant to submit additional information. The following persons appeared and provided testimony on the application:

- | | | |
|-----|----------------|--|
| 1. | Lisa Milliman | Marion County Planning |
| 2. | John Rasmussen | Marion County Public Works Engineering |
| 3. | Carol Lee | Applicant |
| 4. | John Zukle | Proponent |
| 5. | William Gavan | Appellant |
| 6. | Hazel Peterson | Appellant |
| 7. | Jana Gunn | Opponent |
| 8. | Robert Gunn | Opponent |
| 9. | Debra Stanley | Opponent |
| 10. | Steve Mattison | Opponent |
| 11. | Shelly Warner | Opponent |

The following documents were entered into the record as exhibits:

- | | |
|-------|---|
| Ex. 1 | Four pages re: June 21, 2018 appeal hearing, multiple signatories |
| Ex. 2 | Comments of Jana Gunn |
| Ex. 3 | Statement from William & Joan Gavan with attached Lee & Zukle name search printouts |
| Ex. 4 | Comments in opposition, Gary & Laura Weber |

- Ex. 5 Comments of concern, Dan & Terri Cooper (two emails, different dates but same content)
- Ex. 6 Comments of concern, Rick & Jodi Field
- Ex. 7 Comments in opposition, Leslie Ems-Walker
- Ex. 8 Comments in opposition, Ana Sarriugarte
- Ex. 9 Comments in opposition, Rolf Schooler
- Ex. 10 Comments of concern, Leander & Andréa Moncur
- Ex. 11 Comments of concern, Lawrence & Katherine Harris
- Ex. 12 Comments in opposition, Thomas Morrison
- Ex. 13 Comments of concern, Ballyntyne Road neighbors
- Ex. 14 Comments of concern, JW (email & follow up email adding case number)
- Ex. 15 Comments in opposition, Dean & Jennifer Larson
- Ex. 16 Comments in opposition, LeeAnn & Dan O'Leary
- Ex. 17 Comments in opposition, Noel Grefenson for Noel & Ronda Grefenson
- Ex. 18 Comments in opposition, Russell Warner, 28 Jun 18
- Ex. 19 Comments in opposition, Russell Warner, 27 Jun 18
- Ex. 20 Comments in opposition, James & Tanya Cotterell
- Ex. 21 Comments in opposition, Jessica Short
- Ex. 22 Comments in opposition, Lori Gunn
- Ex. 23 Comments in opposition, Sue Guest
- Ex. 24 Comments in opposition, Robert & Jana Gunn with seven listed exhibits
- Ex. 25 Email from Karla Farnsworth with corrected pages for exhibit 24 (minor corrections to page 3)
- Ex. 26 Comments in support from Carol Lee

No objections were raised to jurisdiction, conflict of interest, or to evidence or testimony presented at hearing. Exhibit 1 contains four pages of signatures, and the body of the petition-like form reads:

As a concerned neighbor, I hereby join with the Gavans in appealing the Planning Director's approval of a request for a conditional use to establish a bed and breakfast inn as a home occupation on a 9.4 acre parcel in a SA (Special Agriculture) zone located at 3705 Ballyntyne [Road] S, Salem. We strongly recommend that Conditional Use 18-030 be denied.

The hearings officer interprets these signatories as joining in opposition to the subject application, but denies any after the fact appellant status.

In exhibit 8, Ana Sarriugarte states:

It has come to my attention that Carol Lee, the new owner of the Morrow property, has applied for a high-end bed and breakfast permit. It is my understanding that the initial decision of Marion County was to grant the request and that some neighbors were notified, but I was not one of those. I do feel that everyone should have been notified because we, also, live on this Ballyntyne Road S. and this decision affects all of us that live on this road.

The hearings officer interprets these comments as objections to notice. Under Oregon Revised Statutes (ORS) 215.416(11)(a)(A) and (c)(A)(iii), the

governing body designee, here, the Planning Director, may approve or deny a permit without a hearing with notice and opportunity to appeal to property owners within 750' of the subject property when it is within a farm or forest zone. The notice certification for the Planning Director's decision shows Ms. Sarriugarte was not notified of the director's decision. Comparing the hearing notification map and distances on Assessor's map 083W18B, the record shows that notice was provided to owners of property within 750' of tax lot 083W18B0500. Ms. Sarriugarte does not live within the 750' notification area, and notice was not required. Notice of the Planning Director's decision was not defective.

Notice certification for the June 21, 2018 hearing shows Ms. Sarriugarte was, again, not notified. Under ORS 197.763(2)(a)(C), notice of public hearing shall be provided to applicant and owners of record, as shown on the most recent property tax assessment roll, where the property is within 500 feet of the property that is subject of the notice, when the subject property is within a farm or forest zone. MCC 17.111.030(C)(2) extends Marion County's notification area to 750' within the SA and other resource zones. Ms. Sarriugarte does not live within the 750' notification area. Hearing notice was not defective.

In exhibit 24, opponents Gunn and Gunn raise an issue that could possibly alter the notification area. The Gunns claim Ms. Lee's property includes AR zoned property, and refer to the property description from the deed to Ms. Lee's property that describes tax lot 083W18B0500 as parcel 1, and another property as parcel 2. Parcel 2 may refer to tax lot 083W18B0501, a narrow strip of land running along the east side of tax lot 083W18B0500. The strip is 31.94' wide at the north end and 40.12' wide at the south, and is split zoned SA and AR. But, tax lot 083W18B0501 is in Barbara Morrow's name according to tax roll information attached to the notification map, and not in Ms. Lee's name. Tax lot 083W18B0501 is not attributable to Ms. Lee for notification purposes. Even assuming, without deciding, that Ms. Lee's deed includes tax lot 083W18B0501 in her contiguous holdings, extending the eastern property boundary and notification area by another 40.12' will not bring any additional properties within the notification area. Notice was proper.

IV. Findings of Fact

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

1. The subject property is designated Special Agriculture in the MCCP and zoned SA. The intent of the designation and zoning is to promote and protect commercial agricultural operations. The property is also within a sensitive groundwater overlay (SGO) zone, and partially within a geologically hazardous overlay zone.
2. The subject property is on the north side of Ballyntyne Road S, about 1,500' west of its intersection with Cobb Lane S. The property contains a dwelling, two wells, and a septic system. The property was created in its current configuration in property line adjustment case PLA 03-11 and is considered a legal parcel for land use purposes.

3. Properties north, west, south and southeast are zoned SA, and consist of small rural residential parcels and larger parcels in resource use. Properties to the east on the north side of Ballyntyne Road are zoned AR (Acreage Residential) and are in residential use.
4. Applicant asks to establish a bed and breakfast inn as a home occupation in the existing dwelling on the subject property.
5. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

Marion County Public Works (PW) Land Development and Engineering Permits Section (LDEP) requested engineering condition A and provided engineering requirements B and C as advisories:

ENGINEERING CONDITION

Condition A - *Within 180 days following land use approval, dedicate a 30-foot half-width along the Ballyntyne Road frontage for public right-of-way purposes in order to meet the county's Local road standard [MCC 17.119.60].*

The Applicant will need to engage a licensed Surveyor to accomplish this. Currently there exists a 20-foot right-of-way half-width.

ENGINEERING REQUIREMENTS

- B. Driveways must meet sight distance, design, spacing, and safety standards [MCC 11.10]. The stamped concrete driveway approach, while aesthetically pleasing as it is well done, is not in conformance with PW Engineering standards for a rural road, for a variety of logistical reasons. Prior to establishment of the proposed use, the Applicant is required to remove the concrete within the to-be-expanded (30-foot) public right-of-way, or, record a Removal Agreement with Marion County that acknowledges the possibility for future disturbance/removal of the concrete for such things as utilities, drainage work, road paving, etc. An Application is enclosed for electing the latter option.
- C. The subject property is within the unincorporated area of Marion County and is subject to assessment of Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-10R.

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

Marion County Onsite Wastewater Management stated that septic authorization is required.

Salem Fire Department commented that based on the provided information, it appears the existing home, which is proposed to have five bedroom suites designated as rooms for a B&B, was originally built in 1992. It also appears that the use is still addressed out of the residential code, thus

it would not be requesting a change in the fire department water supply. If additions to the structure are proposed in the future, the fire department would reassess the fire flow calculations at that time.

All other agencies contacted did not respond or stated no objection to the proposal.

V. Additional Findings of Fact-Applicable Law-Conclusions of Law

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

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

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is a hair in applicant's favor, then the burden of proof is met and the application must be approved.

MCC 17.119

2. Under MCC 17.119.100, the Planning Director has the power to decide all MCC title 17 conditional uses. A home occupation, including bed and breakfast inn, is a listed conditional use in the SA zone. The Planning Director could decide this matter.
3. Under MCC 17.119.140, after the Planning Director's final action on a conditional use application, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's decision was mailed on May 14, 2018. Neighbors Joan Gavan, William Gavan and Hazel Peterson, interested persons, appealed the decision on May 23, 2018. The appeal was timely.
4. Under MCC 17.119.150, on appeal of the Planning Director's decision, the hearings officer shall conduct a public hearing in accordance with MCC 17.111. The hearings officer may hear and decide this matter.
5. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a statutory warranty deed recorded in Marion County deed records at reel 4031, page 268 showing that the subject

property (tax lot 083W18B0500) was conveyed to Carol Lee on December 22, 2017. Ms. Lee, as property owner, could file the application. MCC 17.119.020 is satisfied.

6. Under MCC 17.119.025, a conditional use application shall include signatures of all property owners. A December 22, 2017 statutory warranty deed conveyed the subject property to Carol Lee. Property owner, Carol Lee, signed the application. MCC 17.119.025 is satisfied.
7. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:
 - (A) That the hearings officer has the power to grant the conditional use;
 - (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
 - (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
8. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. MCC 17.137.050(D)(1) lists home occupations, including bed and breakfast inns, subject to MCC 17.137.060(C) as a conditional use in the SA zone. MCC 17.119.070(A) is satisfied.
9. MCC 17.137.010 contains the SA zone purpose statement:

The SA (special agriculture) zone is applied in areas characterized by small farm operations or areas with a mixture of good and poor farm soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites. The farm operations range widely in size and include grazing of livestock, orchards, grains and grasses, Christmas trees and specialty crops. The range in size of management units presents no significant conflicts and allows optimum resource production from areas with variable terrain and soils. It is not deemed practical or necessary to the continuation of the commercial agricultural enterprise that contiguous ownerships be consolidated into large parcels suitable for large-scale management. Subdivision and planned developments, however, are not consistent with the purpose of this zone and are prohibited.

This zone allows the flexibility in management needed to obtain maximum resource production from these lands. It emphasizes farm use but forest use is allowed and protected from conflicts. The SA zone is intended to be applied in areas

designated special agriculture in the Marion County Comprehensive Plan.

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

The SA zone retains Class I through IV soils in commercial farm units comparable to those in the vicinity or in small-scale or specialty commercial farms where the land is especially suited for such farming. The SA zone is intended to be a farm zone consistent with ORS 215.283.

MCC 17.137 and related provisions are intended to carry out the purpose and intent of the SA zone. Meeting these provisions ensures a proposal is in harmony with the purpose and intent of the zone. Applicable provisions are discussed below and are not met. MCC 17.119.070(B) is not met.

10. As found below, not all criteria are met and this application is denied. No conditions attach. MCC 17.119.070(C) is not applicable.

MCC 17.137.060(C)

11. Under MCC 17.137.060(C), notwithstanding MCC 17.110.270 and 17.120.075, home occupations, including the parking of vehicles in conjunction with the home occupation, including bed and breakfast inns, are subject to the following criteria:
 1. A home occupation or bed and breakfast shall be operated by a resident of the dwelling on the property on which the business is located. Including the residents, no more than five full-time or part-time persons shall work in the home occupation ("person" includes volunteer, nonresident employee, partner or any other person).
 2. It shall be operated substantially in:
 - a. The dwelling; or
 - b. Other buildings normally associated with uses permitted in the zone in which the property is located.
 3. It shall not unreasonably interfere with other uses permitted in the zone in which the property is located.
 4. A home occupation shall not be authorized in structures accessory to resource use on high-value farmland.
 5. A sign shall meet the standards in Chapter 17.191 MCC.

6. The property, dwelling or other buildings shall not be used for assembly or dispatch of employees to other locations.
7. Retail and wholesale sales that do not involve customers coming to the property, such as Internet, telephone or mail order off-site sales, and incidental sales related to the home occupation services being provided are allowed. No other sales are permitted as, or in conjunction with, a home occupation.
12. Before looking at these criteria, a couple of MCC definitions need to be examined. MCC 17.110.270 defines home occupation as any business or professional activity engaged in for production of income by a resident of a dwelling or dwelling unit as a subordinate use of the building and its premises, and in conformance with the provisions of this title. A home occupation may include a limited home occupation, conditional home occupation or a home occupation in a resource zone. Such term does not include the lease or rental of a dwelling unit or the rooming or boarding of persons on the same premises nor does it include a use meeting the standards of a home office in MCC 17.125 or a marijuana business licensed pursuant to applicable law.

The hearings officer could find no home office standards in MCC 17.125, but did find home office standards in MCC 17.126.020(A)(21). Those standards, among other things, allow no employees. This proposal is not for a home office. Neighbors are particularly concerned whether the proposed use will be a subordinate use of the building and premises. Neighbors explained that the subject single family dwelling is atypical; describing it as 18,000 square feet and containing two apartments with kitchens, seven other bedrooms, a large commercial kitchen, single lane bowling alley, dance floor with bar, and indoor swimming pool and exercise room on nine acres fully landscaped with lawns and formal gardens, and having gated access. Neighbors see no way to monitor on-site activity to ensure compliance with regulations and conditions, and believe the use is likely to morph into a use more akin to hotel than a bed and breakfast inn. Some neighbors suggest, if the use is approved, the bed and breakfast inn should be limited to no more than 1,500 square feet of the dwelling space, and access to on-site amenities such as the pool, exercise room, bowling alley, dance floor, bar, and grounds should be prohibited to help ensure the use will be a subordinate use of the property. Reasonable limitations on the use will be discussed below to address the subordinate use requirement.

13. MCC 17.110.108 defines bed and breakfast inn as a single-family dwelling where lodging and a morning meal for guests only are offered for compensation, having no more than five sleeping rooms for this purpose. An establishment where more than one meal per day is offered shall not be deemed a bed and breakfast inn. An establishment with more than five sleeping rooms shall be deemed a hotel. Unless specifically listed as a permitted or conditional use, a bed and breakfast inn is considered a home occupation. Weddings, receptions, group meetings, conferences and similar

activities are not allowed as secondary uses, accessory uses or temporary uses in association with a bed and breakfast inn.

Under MCC 17.110.190, dwelling unit means an independent area in a building including permanent provision for living, sleeping, eating, cooking, and sanitation occupied by and serving:

- A. A single family;
- B. A single family and rooming or boarding of up to two domestic employees or other persons; or
- C. A single family and residents of a residential home as defined in MCC 17.110.477.

Under MCC 17.110.195, dwelling, single-family means a detached building on a lot, or portion of a building on a separate lot, containing only one dwelling unit, exclusive of a mobile home. The subject structure is a detached building on a separate parcel, but at least one opponent says calling the building a single family dwelling is a stretch. This may be because of the two kitchen apartments and other amenities, but there was also a comment that the structure was a single family dwelling when the previous owners lived there, implying change of ownership alone change the building's status. A change in ownership alone is not sufficient to change the building's status. The building is a single family dwelling and the proposed use must be established and continually run in accordance with the bed and breakfast inn definition, with only sleeping room and morning meal allowed. Additional meals shall not be served. Only five sleeping rooms are allowed, and they must be bedrooms only, not rooms with kitchens. The home occupation must be subordinate to residential use of the dwelling. Weddings, receptions, group meetings, conferences and similar activities are not allowed.

Opponents make a fair argument that monitoring the use will be difficult because it is such a large dwelling with many amenities such as exercise room, swimming pool, dance hall and so on. These amenities must be off limits to bed and breakfast guests. A bed and breakfast is a sleeping room and a morning meal. This does not mean guests cannot walk the grounds nor have morning meals outside, but the grounds cannot be used to host events. The use cannot be advertised as anything more than a room to sleep in and a morning meal to eat.

- 14. Ms. Lee testified under oath that she lives on the subject property. Some neighbors are skeptical of the claim, stating Ms. Lee has been seen on the property only once in six months of ownership. Ownership does not imply residency, and Ms. Lee listed a Lake Oswego address on the application form before it was crossed out and the Ballyntyne Road address added. Still, it is not necessarily unusual to purchase a property and not move in immediately. Ms. Lee's residency will be required as a condition of approval, and failure to reside on the property would allow revocation of any approval.

No more than five full-time or part-time persons shall work in the home occupation ("person" includes volunteer, nonresident employee, partner or any other person). At hearing, Ms. Lee referred to, John Zukle, as her partner, and stated that he was speaking for her. Ms. Lee and Mr. Zukle both spoke of running the proposed bed and breakfast inn and both are included in the bed and breakfast worker count. Ms. Lee also anticipates two employees will perform 1.5 jobs, cleaning rooms and serving breakfast. The use will be limited to no more than these four positions to help keep the proposed use subordinate to the primary residential use of the property.

With conditions, MCC 17.137.060(C) (1) could be met.

15. The dwelling is the only building on the property. The business shall be operated substantially in the dwelling. With this condition, MCC 17.137.060(C) (2) would be met.
16. The subject property is in the SA zone. Appellants claim a portion of the subject property is zoned AR and should be judged on the more restrictive AR standards and criteria. As noted in section III above, the Marion County tax roll identifies the SA/AR zoned strip next to the subject property as in Barbara Morrow's ownership. Even if tax lot 083W18B0501 is in Ms. Lee's ownership, the requested use is proposed for tax lot 083W18B0500, which is in the SA zone. The SA zone is examined for MCC 17.137.060(C) (3) purposes.

MCC 17.137.020 through 137.050 list more than 50 allowed, permitted subject to standards, and conditionally permitted uses in the SA zone. Uses range from agricultural and forest uses to nonfarm dwelling uses. This proposed use includes only five sleeping rooms with breakfasts and will take place primarily inside the dwelling, and no events. There will be no fireworks to frighten nearby horses or set the woodlands on fire, and no live bands to disturb nearby residential uses. Still, even quiet enjoyment of property can sometimes interfere with farm zone uses because of complaints about aerial spraying, chainsaw use, helicopter harvesting, tractors raising dust, night time farm operations, manure smells and so on. A declaratory statement discussed in V(27) below will be required as a condition of any approval to help alleviate issues associated with farm and forest practices. Even with this, the record does not contain sufficient detail to say the use will not interfere with farm and forest practices.

Neighbors living in the farm zone (and in nonfarm zones) are concerned about safety issues associated with increased traffic on Ballyntyne Road S. The road provides the only outlet for the neighborhood and is, for the portion that is part of the county transportation network, identified in the 2005 MCC-adopted Rural Transportation Plan (RTSP), Appendix B, as a dead end, mile long, two lane local road within a 40' right-of-way, with 20' paved travel surface and no shoulders, that is in very good condition, with a 220 trip traffic volume, operating at a level of service (LOS) A (the highest LOS). The 2013 RSTP Appendix B update (not yet adopted) shows traffic volume at 250 trips and road condition as good rather than very

good. There is evidence of accidents occurring on Ballyntyne Road though some may not have been officially reported. Testimony cited vertical curvature and excess speed as possible contributing factors. Still, the roadway is operating at a high level of service, and fear that outsiders, unfamiliar with the road will cause accidents is speculative. Based on testimony it seems have been involved in and caused most accidents. Ballyntyne Road S is a public road, available for use by all of the public, and is not restricted to resident-only use. Increased traffic may not be desired, but the road is operating at LOS A and has capacity to handle additional traffic attributable to bed and breakfast guests and employees.

Even with imposed conditions, it is not clear that the proposal will not interfere with farm and forest practices with other uses permitted in the SA zone. **MCC 17.137.060(C) (3) is not satisfied.**

17. The subject property is on high-value farm land, but no farm use is taking place on the subject property. Only one building is on the property, and it is not a farm structure. The use will not be conducted in farm-related structures. MCC 17.137.060(C) (4) is met.
18. MCC 17.191.065 (A) and (E) allow one unlighted wall, window or freestanding sign with no more than 32 square feet per street frontage (one Ballyntyne Road frontage), at no more than eight feet high. With these restrictions as conditions of any approval, MCC 17.137.060(C) (5) could be met.
19. The proposed use will take place entirely on the subject property. No assembly or dispatch of workers to other locations will take place. With this as a condition of approval, MCC 17.137.060(C) (6) can be met.
20. Customers will not be coming to the property for retail and wholesale product sales, only for a sleeping room and a morning meal. With a condition prohibiting retail and wholesale sales, MCC 17.137.060(C) (7) would be met.

MCC 17.137.060(A)

21. Under MCC 17.137.060(A), the following criteria apply to all conditional uses in the SA zone:
 1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
 2. Adequate fire protection and other rural services are or will be available when the use is established.

3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
22. *Farm practices.* MCC 17.136.060(A)(1) incorporates OAR 660-033-0130(5) and ORS 215.196(1) requirements. ORS 215.196(1) as interpreted in *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), requires a three-part analysis to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require the county to consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

Surrounding lands is not defined in the MCC, but it makes sense to consider properties within the 750' notice area. The notice requirement presumes properties within that area might be affected by a proposed use. Applicant did not address farm or forest uses or practices occurring on surrounding lands in her initial application materials, and at hearing applicant's partner, speaking for her, stated that the only farm use they saw was a Christmas tree farm a mile down the road. This does not address what farm uses and practices are taking place on surrounding land. Applicant provides no information on day-to-day bed and breakfast operations and does not analyze whether farm practices will be impacted or whether impacts could be mitigated.

Neighbors provided some additional information on area farm uses, pointing out that many surrounding properties are wooded and likely in timber deferral, that a miniature horse operation takes place on a 40-acre farm to the north and a portion of that property is in forest tax deferral; that an organic Christmas tree operation is on a 60 acre parcel across Ballyntyne Road; and that some Christmas tree operations in the area use helicopters to harvest trees. Forest and farm practices need to be determined and analyzed. As explained in V(16) above, even quiet enjoyment of property can sometimes interfere with farm zone uses because of complaints about aerial spraying, chainsaw use, helicopter harvesting, tractors raising dust, night farm operations, manure smells and so on. Applicant has not met the burden of proving it is more likely than not that the proposed use will not force a significant change in, or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. **MCC 17.137.060(A)(1) is not satisfied.**

23. *Adequate services.* Utility lines are available to the subject property. Septic authorization will be required to ensure the current wastewater disposal system is adequate to support the proposed use. The RSTP and Ballyntyne Road S discussion from V(16) above is adopted here. MCPW requested a 30' half width dedication along the subject property's Ballyntyne Road frontage within 180 days of any land use approval. The dedication is requested to ensure county local road right-of-way half width standards and adequate access can be met at the subject property. PW discussed the proposed condition with applicant and applicant stated no objection to the right-of-way dedication at hearing. PW also commented that applicant's current driveway apron is not built to PW standards, but because roadway improvement is not eminent, PW decided it could require a removal agreement for the apron in lieu of present improvements. The permit process will ensure adequate driveway access to the public right-of-way. A condition can also require applicant to submit proof to the Planning Division that Salem Fire District approved a site access and identification plan prior to building permit issue. With conditions requiring frontage dedication, driveway permitting, fire district access and premises identification compliance, and septic authorization, adequate services are or will be available upon development. MCC 17.137.060(A)(2) can be met.
24. *Significant adverse impact.* The site is not within an MCCP identified peripheral or major big game habitat area, or near MCCP identified sensitive rivers, streams or headwaters. No MCCP identified wetlands are on or near the property. No MCCP identified watershed areas are nearby. The subject property is not in a floodplain overlay zone. The very northwest corner of the property is within a geologically hazardous overlay zone, but no earthwork or other development is proposed in the geo-hazard zone or elsewhere on the property. A septic authorization will be required as a condition of any approval to help protect water quality. No serious air emissions are associated with providing an overnight room and morning meal.

The subject property is within an SGO zone and the Oregon Water Resources Department (OWRD) South Salem Hills Groundwater Limited Area (GLA) described in OAR 690-502-0200 at exhibit 11. SGO requirements are not triggered by this application, but under OAR 690-502-0200(1), groundwater within the basalt aquifer in the South Salem Hills GLA is classified for exempt uses, irrigation and rural residential fire protection systems only. Opponents claim applicants are violating exempt use laws, specifically ORS 537.545(1)(b).

Under ORS 537.545(1), no registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under ORS 537.505 to 537.795 and 537.992 is required for the use of ground water for:

- (a) Stockwatering purposes;
- (b) Watering any lawn or noncommercial garden not exceeding one-half acre in area;

- (c) Watering the lawns, grounds and fields not exceeding 10 acres in area of schools located within a critical ground water area established pursuant to ORS 537.730 to 537.740;
- (d) Single or group domestic purposes in an amount not exceeding 15,000 gallons a day;
- (e) Down-hole heat exchange purposes;
- (f) Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day; or
- (g) Land application, so long as the ground water:
 - (A) Has first been appropriated and used under a permit or certificate issued under ORS 537.625 or 537.630 for a water right issued for industrial purposes or a water right authorizing use of water for confined animal feeding purposes;
 - (B) Is reused for irrigation purposes and the period of irrigation is a period during which the reused water has never been discharged to the waters of the state; and
 - (C) Is applied pursuant to a permit issued by the Department of Environmental Quality or the State Department of Agriculture under either ORS 468B.050 to construct and operate a disposal system or ORS 468B.215 to operate a confined animal feeding operation.

Testimony from neighbors, indicates that the 9.4-acre parcel, except for impervious surfaces, is in lawn and formal gardens watered by a system supplied from two exempt water wells, amounting to several watered acres. The estate grounds can be seen in aerial photos in the record. Multiple water wells do not allow increased volumes for exempt uses. It is not definitive that wells on the subject property tap the basalt aquifer, but opponents have sufficiently raised the issue of adherence to state water law, implicating MCC 17.110.680:

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

A condition of approval could require applicant to provide proof from OWRD that applicant is in full compliance with Oregon water use laws and regulations. This could satisfy MCC 17.110.680, and help ensure groundwater resources are protected. If conditions of approval are met, the proposed use would have no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality and MCC 137.060(A) (3) would be met.

25. *Noise.* Limiting the use to five sleeping rooms and breakfast only, requiring compliance with MCC 8.45 noise standards, and prohibiting events and activities on the property can be made conditions of any approval. With these conditions, the use will not generate disturbing noise, and MCC 17.136.060(A) (4) could be satisfied.
26. *Water impounds/mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.137.060(A) (5) is satisfied.

MCC 17.136.100(C)

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

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

The subject property is in an area of farm and forest use, where practices such as aerial Christmas tree harvesting are known to occur. Applicant is proposing a potentially sensitive use. Filing this declaratory statement shall be required as a condition of any approval of this application.

VI. Order

It is hereby found that applicant has not met the burden of proving applicable standards and criteria for approval of a conditional use application

to establish a bed and breakfast inn as a home occupation on a 9.4-acre property in the SA zone have been met. The conditional use application is **DENIED**.

VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 21st day of September 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 17th day of September 2018.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Carol Lee 3705 Ballyntyne Road S. Salem, OR 97302	<u>Agencies Notified</u> Planning Division (via email: gfennimore@co.marion.or.us) (via email: lmilliman@co.marion.or.us) (via email: breich@co.marion.or.us)
Johnny Zukle c/o Carol Lee 3705 Ballyntyne Road S. Salem, OR 97302	Code Enforcement (via email: bdickson@co.marion.or.us) Building Inspection (via email: twheeler@co.marion.or.us) Assessor (via email: assessor@co.marion.or.us) PW Engineering (via email: jrassmussen@co.marion.or.us) DLCD (via email: timothy.murphy@state.or.us)
Hazel Peterson 3810 Ballyntyne Road S. Salem, OR 97302	Salem Fire District (via email: ghadley@cityofsalem.net)
Russell and Shelly Warner 5235 Misty Pine Lane S. Salem, OR 97302	Aileen Kaye (AAC Member No. 1) 10095 Parrish Gap Road SE Turner, OR 97392
Debra Stanley 3800 Ballyntyne Road S. Salem, OR 97302	Laurel Hines (AAC Member No. 1) 10371 Lake Drive SE Salem, OR 97306
William and Joan Gavan 5255 Misty Pine Lane S. Salem, OR 97302	Lawrence and Katherine Harris 3515 Ballyntyne Road S. Salem, OR 97302
Steve Mattison 3075 Ballyntyne Road S. Salem, OR 97302	Gary and Laura Weber 3495 Ballyntyne Road S. Salem, OR 97302
Robert and Jana Gunn 5155 Phantom Creek Lane S. Salem, OR 97302	Thomas and Verna Morrison 5222 Cobb Lane S. Salem, OR 97302
Bonnie Anderson 5215 Cobb Lane S. Salem, OR 97302	David McKay 3665 Ballyntyne Road S. Salem, OR 97302
Dan and Terri Cooper 3505 Ballyntyne Road S. Salem, OR 97302	William and Sue Guest 5116 Cobb Lane S. Salem, OR 97302
Leslie Ems-Walker 2861 Ballyntyne Road S. Salem, OR 97302	Ana Sarriugarte 4742 Liberty Road S. Salem, OR 97302

Dean and Jennifer Larson
2771 Ballyntyne Road S.
Salem, OR 97302

Noel and Ronda Grefenson
Grefenson P.C.
1415 Liberty St. SE
Salem, OR 97302

James and Tanya Cotterell
5255 Shady Oaks Way S.
Salem, OR 97302

Jessica Short, RDN, LD
The Oasis Center for Counseling and Wellness
4305 River Road N.
Keizer, OR 97303

Leander and Andréa Moncur
2791 Ballyntyne Road S.
Salem, OR 97302-9615

Rolf Schooler
5155 Cobb Lane S.
Salem, OR 97302

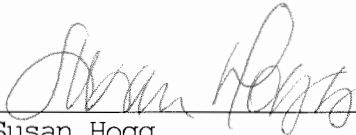
JP Webb
5030 Durango Court SE
Salem, OR 97306

Robert J. Gunn
Gunn & Gunn, P.C.
P.O. Box 4057
Salem, OR 97302

Meriel Darzen
1000 Friends of Oregon
133 SW 2nd Avenue, Suite 201
Portland, OR 97204

Rick and Jodi Field
4742 Liberty Road S., No. 176
Salem, OR 97302

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 7th day of September 2018, and that the postage thereon was prepaid.



Susan Hogg
Secretary to Hearings Officer