

**Attention Property Owner:** A land use proposal has been submitted for property near where you live or near property you own elsewhere. State law requires the county notify property owners within a certain distance from this property. The proposal and address of the property is described in the "Application" section. The decision in this case does not directly affect the zoning or use of your property. If you object to the decision, refer to the "Appeal" section. If you have questions, contact the staff person listed at the end of this report.

**NOTICE OF DECISION  
ADMINISTRATIVE REVIEW CASE NO. 19-003**

**APPLICATION:** Application of James Olson, Trustee of the James Olson Revocable Living Trust, for an administrative review to determine if applicant has a vested right to place a non-farm dwelling approved by Conditional Use Case 07-057, on a 5 acre parcel in an EFU (Exclusive Farm Use) zone located at 9110 55<sup>th</sup> Ave. SE, Turner. (T9S; R2W; Section 4; tax lot 500).

**DECISION:** The Planning Director for Marion County has determined the applicant has a vested right to continue with development of a dwelling on the property, subject to certain conditions.

**WARNING:** A decision approving the proposal is for land use purposes only. Due to septic, well and drainfield replacement areas, this parcel may not be able to support the proposal. To be sure the subject property can accommodate the proposed use the applicant should contact the Building Inspection Division, (503) 588-5147.

**This decision does not include approval of a building permit.**

**CONDITIONS:** The following conditions must be met before a building permit can be obtained or the approved use established:

1. The applicant shall obtain all permits, including subsurface sewage disposal, required by the Marion County Building Inspection Division.
2. The applicant shall meet the prior conditions of approval for Conditional Use Case #07-57:
  - a. A 100 foot dwelling setback and a 100 foot accessory structure setback shall be maintained from the northern property line.
  - b. Prior to obtaining building permits, the applicant must provide evidence to the Planning Director that the property has been permanently disqualified from special farm deferral.

**OTHER PERMITS, FEES AND RESTRICTIONS:** This approval does not remove or affect covenants or restrictions imposed on the subject property by deed or other instrument. The proposed use may require permits and/or fees from other local, state or federal agencies. This decision does not take the place of, or relieve the responsibility for, obtaining other permits or satisfying restrictions or conditions thereon. It is recommended that the agencies mentioned in Finding #5 below be contacted to identify restrictions or necessary permits. The applicant is advised of the following:

3. The applicants should contact the Turner Fire District to obtain a copy of the District's Recommended Building Access and Premise Identification regulations and the Marion County Fire Code Applications Guide. Fire District access standards may be more restrictive than County standards.

**APPEAL PROCEDURE:** The Marion County Zone Code provides that certain applications be considered first by the County Planning Director. If there is any doubt that the application conforms with adopted land use policies and regulations the Director must deny the application. Anyone who disagrees with the Director's decision may appeal the decision to a Marion County hearings officer. The applicant may also request reconsideration (one time only and a \$200.00 fee) on the basis of new information subject to signing an extension of the 150 day time limit for review of zoning applications.

A public hearing is held on appeals subject to the appellant paying a \$250.00 fee. Appeals must be in writing (form available from the Planning Division) and received in the Marion County Planning Division, 5155 Silverton Rd. NE,

Salem by 5:00 p.m. on **March 28, 2019**. If you have questions about this decision contact the Planning Division at (503) 588-5038 or at the office. This decision is effective **March 29, 2019** unless appealed.

**FINDINGS AND CONCLUSIONS:** Findings and conclusions on which the decision was based are noted below.

1. The subject property is designated Primary Agriculture in the Marion County Comprehensive Plan and zoned EFU (Exclusive Farm Use). The intent of this designation and the corresponding zone is to promote the continuation of commercial agriculture in the area. Non-farm uses, such as non-farm related dwellings, can be approved where they do not impact the ability of the nearby land to be farmed.
2. The subject property is located on the east side of 55<sup>th</sup> Avenue SE southeast of Hennies Road SE. The property was approved for non-farm dwellings in the past, most recently by Conditional Use Case #07-57, but past approvals have expired.
3. Surrounding uses consist of rural homesites and properties being farmed in an EFU zone.
4. The National Resource Conservation Service (NRCS) categorized soils on the property so that the land will no longer qualify for a non-farm dwelling in the EFU zone. However, the property owner has expended substantial sums preparing the property for a dwelling and, thus, has sought a determination the property is vested to be able to continue with the development of a dwelling.
5. Public Works Land Development and Engineering Permits commented:
  - A. In accordance with Marion County Code 11.10, driveway permits will be required for any new access or change in use of the existing access to the public right-of-way. The applicant shall be required to apply for a driveway "Access Permit" and construct any improvements required by the permit. Driveways must meet sight distance, design, spacing, and safety standards. The metal swing gate will need to be relocated such that it is at a minimum distance of 25 feet from the edge-of-pavement to allow for safe ingress/egress without blocking the traveled way. The need for crushed rock is also anticipated. The metal portion of the driveway culvert may also need to be replaced in accordance with Marion County Engineering Standards.
  - B. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits, per Marion County Ordinances #00-10R and #98-40R, respectively.

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

6. Marion County Code (MCC) authorizes the Planning Director to issue a determination or administrative review regarding conformance of existing or proposed uses on a particular lot or parcel within the requirements of this title, including determinations or administrative reviews relating to nonconforming uses as provided in Chapter 17.110 MCC, subject to the requirements of this chapter. While there are no requirements in Chapter 17 of the code, MCC 2.45 contains criteria related to vested rights that can be informative in this consideration. These criteria are based upon the case of Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973), which first recognized the concept of vested rights in the land use context:

*a. The ratio of expenditures incurred to the total cost of the project;*

The applicant provided a list of expenditures related to the project. Some of the items were repeated in two places in the application documentation, such as the well, which is included in the tables on both pages 4 and 7. Some costs listed in the tables have been incurred and some are future costs, which together total the full budget to build a dwelling on the property. Also, costs related to cleaning up the property due to solid waste would be incurred regardless of whether a dwelling was being placed on the property. The costs were incurred due to the health and safety requirements, not dwelling placement, and the work must be done regardless of the final use of the land. Similarly, the costs related to environmental clean-up appear due to the solid waste previously on the property not due to the future construction of the dwelling. Costs related to irrigation could be incurred with incidental

farming or other use of the property and need not be considered related to the construction of the dwelling for the purposes of calculating this ratio. Planning provides below a summary of the costs it determined to be related to constructing a dwelling on the property:

	Paid to Date	Future Cost
Marion County Extension of CU 07-45	125.00	
Attorney Fees for 2007 Application and Extension	800.30	
Septic Tank Application Fee	560.00	
Compensation for Septic Work (2007-2009)		850.00
Soil Surveyor	750.00	
2018 Conditional Use/Vesting Argument/Attorney Fees and Costs		5000.00
Update Soil Surveyor	350.00	
Install Well	9800.00	
Purchase of used manufactured home		20000.00
Pour of slab		6000.00
Placement of manufactured home		4500.00
Septic		24000.00
Totals	12385.30	60350.00
Total project cost	72735.30	
Percent paid to date of total cost	17%	
	Paid to Date	Future Cost

The property owner has spent approximately 17% of the total budget to construct a dwelling on the property. In Holmes, the Supreme Court found that a ratio of 1 to 14 (7%) was an acceptable ratio to support a vested right. This criterion is met.

*b. The good faith of the developer;*

The property owner purchased the property with the intent of constructing a dwelling and has proceeded to obtain a dwelling placement approval from Planning and incurred costs related to constructing a dwelling. This criterion is met.

*c. Whether the developer had notice of any proposed zoning or amendatory zoning before starting the improvements;*

There have been no zoning changes related to the proposal. This criterion does not apply.

*d. The type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to other various uses of the land;*

The table above summarizes the expenditures that Planning considered related to the completed project and that couldn't be applied to various other uses of the land. As described in (a) above, the property owner has made substantial progress toward the construction of the dwelling based on expenditures. This criterion is met.

*e. The nature, location, and ultimate cost of the project;*

The dwelling previously received land use approval. The ultimate cost of the project appears consistent with constructing a dwelling on the property. This criterion is met.

*f. Whether the actions rise beyond mere preparation; and*

Costs related to cleaning up solid waste on the property or related to other potential uses of the property were removed from the table above. The remaining costs, and the actions associated with them, are clearly related to constructing a dwelling on the property and go beyond mere preparation. This criterion is met.

g. *Other relevant factors:*

The applicant's representative identified two additional criteria based on Holmes which are not present in MCC 2.45:

h. *The amount of reliance on the prior zoning classification in purchasing the property and making expenditures to develop the property.*

While the property owner sought land use approval for the dwelling, a non-farm dwelling is a conditional use and is not permitted outright. The approval had to be renewed every two years in order to stay effective. The decision stated that extensions may not be granted if the regulations have changed since the original approval. It's likely the property could have expected that the approved use might expire or otherwise not be allowed to continue based on the nature of the use being conditional and the expiration language in the land use approval.

i. *The extent of the nonconformity of the proposed use as compared to the allowed use in the subsequent zoning ordinance.*

While the use is not a nonconforming use, a non-farm dwelling is a conditional use - it is not permitted outright. It's likely the property owner could have expected that the approved use might not be allowed under all circumstances or that the particular circumstances under which approved the non-farm dwelling was originally approved might change and the use would no longer be allowed.

7. On the balance of the findings discussed above, it is determined that the applicant has a vested right to continue with development of a dwelling on the property, subject to meeting the applicable conditions of approval of the land use case which originally permitted the dwelling, Conditional Use Case #07-57.

Joe Fennimore  
Planning Director

Date: March 13, 2019

If you have any questions regarding this decision contact Brandon Reich at (503) 588-5038

Notice to Mortgagee, Lienholder, Vendor or Seller: ORS Chapter 215 requires that if you receive this Notice, it must promptly be forwarded to the purchaser.