



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: September 16, 2020

Department: Public Works Agenda Planning Date: Sept. 10, 2020 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature: Brian Stehler

Form with fields: TITLE, Issue, Description & Background, Financial Impacts, Impacts to Department & External Agencies, Options for Consideration, Recommendation, List of attachments, Presenter.

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

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

1. The subject property is designated Special Agriculture in the Marion County Comprehensive Plan and zoned SA – Special Agriculture. The intent of both the designation and zone is to promote and protect commercial agricultural operations.
2. The subject property is located on the south side of Skyline Road South, at the intersection with Brindlewood Way South. The parcel is undeveloped. The property is described as Lot 28 of the Ireton Fruit Farms Plat, which was first platted on June 16, 1999. This property is considered legal for land use purposes.
3. Surrounding properties in all directions are zoned SA and in a mixture of small scale farm use, woodlots, and residential uses.
4. The Soil Survey of Marion County, Oregon indicates 97.6% of the property is comprised of high-value farm soils.
5. The Applicant is proposing to establish a dwelling under lot-of-record provisions in the SA zone.
6. Applicants have the burden of proving 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.)

Applicants must prove, by substantial evidence in the whole record, that it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, Applicants have not met their burden and the application must be denied. If the evidence for every criterion is in Applicants’ favor, then the burden of proof is met and the application must be approved.

Marion County Public Works Land Development and Engineering Permits (LDEP) requested that the following requirements and advisories be included in the land use decision:

- A. At the time of application for building permits and Access Permit will be required. Separate access to serve the dwelling is allowable. In the alternative, access may be taken from the driveway approach located at the southern end of the property, which also provides indirect access to #6394 Skyline Rd. If it is desired to use the southern

access as a shared access, then it will likely be required to modify the approach perpendicular to Skyline Road.¹

- 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.
- C. Utility work in the public right-of-way requires separate PW Engineering permits.

VI. Additional Findings of Fact and Conclusions of Law

Marion County Code (MCC) 17.137.030(d) provides the approval criteria for a lot of record dwelling in the SA zone. The August 5, 2020 staff report thoroughly explains how all of the applicable approval criteria are satisfied. I have reviewed the findings in the staff report, and I agree with those findings. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further. The following findings are taken largely from the staff report.

MCC 17.137.030(D)(1) provides:

"The lot or parcel on which the dwelling will be sited was lawfully created and acquired and owned continuously by the present owner:

"(a) Since prior to January 1, 1985; or

"(b) By devise or intestate succession from a person who acquired and had owned continuously the lot or parcel since prior to January 1, 1985.

"(c) 'Owner', as the term is used in this section only, includes the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner or business entity owned by any one or combination of these family members."

The Applicant indicates that the property was first purchased by Harrison W. Elgin and Pauline W. Elgin on November 29, 1961. On July 14, 2010, the land was deeded by Pauline W. Elgin's personal representative to her son, Harrison W. Elgin III. This standard is met.

MCC 17.137.030(D)(2-4) provides:

"(2) The tract on which the dwelling will be sited does not include a dwelling.

¹ As discussed later, neither the southern access point discussed by LDEP nor a northern access point are allowable as access points to the proposed lot of record dwelling. Only a non-shared access in the center portion of the property is allowable.

"(3) The lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, and no dwelling exists on another lot or parcel that was part of that tract.

"(4) When the lot or parcel on which the dwelling will be sited is part of a tract, the remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed."

Since the property was purchased in 1961, it has never been part of the tract; the above standards are met.

MCC 17.137.030(D)(5) provides:

"The request is not prohibited by, and complies with, the Comprehensive Plan and other provisions of this ordinance, including but not limited to floodplain, greenway, and big game habitat area restrictions."

The property is not in an identified big game habitat area, floodplain, or greenway area. The property is in a Sensitive Groundwater Overlay zone; however, those provisions do not apply when adding to an existing property. If approved, the SA Zone requires a property owner to record a declaratory statement acknowledging the SGO zone on the property and this can be made a condition of approval.

MCC 17.137.030(D)(6) provides:

"The proposed dwelling will not:

"(a) Exceed the facilities and service capabilities of the area.

"(b) Create conditions or circumstances contrary to the purpose of the Special Agriculture zone."

Applicant indicates the proposed dwelling will rely on individual septic system and water will be provided by an exempt well. The property is inside the Salem Suburban Fire Protection District and all needed rural services are available to the property. Applicant indicates that the placement of a dwelling on the property will be reflective of the current development pattern of the area which includes a mixture of SA properties, many of which contain dwellings. The SA zone contains provision for placing a dwelling under the lot-of-record provisions. If all the other standards can be met, the use will be in harmony with the purpose of the SA zone, and this standard will be satisfied.

MCC 17.137.030(D)(7-8) provide:

"(7) A lot-of-record dwelling approval may be transferred by a person who has qualified under this section to any other person after the effective date of the land-use decision.

"(8) The County Assessor shall be notified that the county intends to allow the dwelling."

These standards will be made conditions of approval.

MCC 17.137.030(D)(9-11) provide in pertinent part:

"(9) The lot or parcel on which the dwelling will be sited is not high-value farmland as defined in Section 17.137.130(D); or

"(10) The lot or parcel on which the dwelling will be sited is high-value farmland as defined in MCC 17.137.130(D) (2) or (3); or* * *

"(11) The lot or parcel on which the dwelling is to be sited is high-value farmland as defined in MCC 17.137.130(D)(1)* * *:

Approximately 98 percent of the soils on the parcel are Class II, Jory, which are defined as high-value in MCC 17.137.130(D)(1). Therefore MCC 17.137.030(D)(11)(a-b) are applicable, which provide:

"(a). The hearings officer determines that:

"i. The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity. For the purposes of this section, this criterion asks whether the subject lot or parcel can be physically put to farm use without undue hardship or difficulty because of extraordinary circumstances inherent in the land or its physical setting. Neither size alone nor a parcel's limited economic potential demonstrates that a lot or parcel cannot be practicably managed for farm use. Examples of 'extraordinary circumstances inherent in the land or its physical setting' include very steep slopes, deep ravines, rivers, streams, roads, railroad or utility lines or other similar natural or physical barriers that by themselves or in combination separate the subject lot or parcel from adjacent agricultural/and and prevent it from being practicably managed for farm use by itself or together with adjacent or nearby farms. A lot or parcel that has been put to farm use despite the proximity of a natural barrier or since the placement of a physical barrier shall be presumed manageable for farm use; and

"ii. The use will not force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm or forest use; and

"iii. The dwelling will not materially alter the stability of the overall/and use pattern in the area. To address this standard, the following information shall be provided:

"(A) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or non-resource uses shall not be included in the study area;

"(B) Identify within the study area the broad types of farm uses (irrigated or non-irrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, non-farm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of non-farm/lot-of-record dwellings that could be approved under subsection D of this section and MCC 17.137.050(A), including identification of predominant soil classifications and parcels created prior to January 1, 1993. The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible non-farm dwellings under this provision;

"(C) Determine whether approval of the proposed non-farm/lot-of-record dwellings together with existing non-farm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential non-farm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase, lease farmland, acquire water rights or diminish the number of

tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.

“(b) The county shall provide notice of the application for a dwelling allowed under this subsection to the Oregon Department of Agriculture.”

Applicant indicates that the parcel is only 4.71 acres in size and is currently fallow. It is triangular shaped parcel with frontage on Skyline Road. Surrounding properties to the north, east, and south are developed with rural home sites. The property is in a designated groundwater limited area, since there are no water rights; it would not be possible to establish an intensive farm dependent upon irrigation. The shape and topography of the land makes it not conducive to farming grain or grass crops. If a home site is approved on the parcel it could enable the owner to do some hobby farming where profit margins are not critical. MCC 17.137.030(D)(11)(a)(i) is met.

There are no commercial farming operations on adjacent properties. The development standards in the zone should provide adequate buffer to mitigate any potential impacts. In addition, MCC 17.137.100(C) requires that a Declaratory Statement be recorded with the property deed because the subject property is in a resource zone. This serves to notify the Applicant and subsequent owners that there are farm or timber operations in the area. MCC 17.137.030(D)(11)(a)(ii) is met.

A 2000 study area centered as much as possible on the subject property was created using county GIS mapping services. The analysis includes soil information, zoning, and tax assessor data. The Applicant describes the steps taken in the analysis and how the conclusions were reached. The study concludes that the number of potential lot-of-record dwellings and non-farm dwelling is six, out of 189 parcels included in the study area. Due to the small number of potential dwellings, approval of this request should have very little, if any, impact on the stability of the land use pattern of the area. MCC 17.137.030(11)(a)(iii) is met.

The Oregon Department of Agriculture will be notified if this request is approved. MCC 17.137.030(11)(b) is met.

All of the approval criteria of MCC 17.137.030(D) are met.

Terry Kessler (Kessler) lives directly south of the Applicant on Skyline Road South (Skyline Road). Kessler does not oppose the application, but he has concerns about the requirements from LDEP that suggest that a southern shared access point could be used for access to the proposed lot of record dwelling. According to Kessler, the purported southern access point is not a shared access point – it is merely Kessler's access point. Kessler wants to make sure that his access point is not used for access to the proposed lot of record dwelling.

Krista Anderson (Anderson) lives directly north of the Applicant on Skyline Road. Anderson also has an access point that is close to the boundary of her property with the Applicant. As with Kessler, Anderson explains that her access point is solely hers and not a shared access point with the Applicant's property. Although Anderson's access point is not mentioned in the staff report, she is also concerned that her access point might be used as an access point to the proposed lot of record dwelling.

Both the Applicant and his representative explained that they do not dispute Kessler and Anderson's statements that the access points near the northern and southern border of the applicant's property are not shared access points. The Applicant explains that he has no intention of attempting to use either Kessler or Anderson's access point. As the site plan demonstrates, the proposed access point is roughly in the middle of the Applicant's property. As the Applicant agrees not to attempt to use either Kessler or Anderson's access point there is no longer any dispute.² I appreciate the cooperation between Kessler, Anderson, and the Applicant to resolve this issue.

All of the applicable approval criteria are satisfied.

VII. Order

It is hereby found that the Applicant has met his burden of proving the applicable standards and criteria for approval of an administrative review application for a lot of record dwelling have been met. Therefore, the administrative review application is **APPROVED**, with the following conditions:

1. This decision is valid only when exercised within four years of the date the decision becomes final unless an extension is granted. The effective period may be extended for two years subject to approval of an extension. Request for an extension must be submitted to the Planning Division prior to expiration of the approval (form available from the Planning Division).
2. The Applicant shall obtain approval for all required permits from the Marion County Building Inspection Division.
3. Prior to issuance of a building permit, the Applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. This statement shall be recorded by the Applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director.
4. Prior to the issuance of a building permit, the Applicant shall sign and submit an SGO Declaratory Statement to the Planning Division. This statement shall be recorded by the Applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director.
5. The lot of record dwelling approval may be transferred **one time only** by a person who has qualified under this decision to any other person after the effective date of the land use decision.
6. The Applicant will not use a shared access point to access the lot of record dwelling.

² It is not entirely clear why LDEP believed Kessler's access point is a shared access. In any event, as testimony at the public hearing made clear, the southern access point is not a shared access point but rather Kessler's access point. Therefore, the proposed lot or record dwelling may not use Kessler's (or Anderson's) access point.

VIII. 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 St. NE, Salem, OR 97301) by 5:00 p.m. on the 23rd day of September 2020. 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 8th day of September, 2020.



Fred Wilson
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Norm Bickell
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Salem, OR 97317

Harrison W. Elgin III
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Warren Griffin
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Mardi Schleif and Terry Kessler
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Krista Anderson
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P.O. Box 3274
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Agencies Notified:

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(via email: gfennimore@co.marion.or.us)

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Salem Suburban Fire District

(via email: SMANSFIELD@cityofsalem.net)

DLCD:

(via email: hilary.foote@state.or.us)

Laurel Hines – AAC Member 1
10371 Lake Drive SE
Salem, OR 97306

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 8th day of September, 2020, and that the postage thereon was prepaid.


Susan Hogg
Administrative Assistant to the
Hearings Officer