



MARION COUNTY BOARD OF COMMISSIONERS

**Board Session Agenda Review Form**

Meeting date: August 14, 2024

Department: Public Works

Title: Receive notice of Hearings Officer's decision denying Conditional Use 24-006/Joy Blackman Revocable Trust

Management Update/Work Session Date: \_\_\_\_\_ Audio/Visual aids ☐

Time Required: 0 min Contact: John Speckman Phone: 503-566-4173

Requested Action: Receive notice of Hearings Officer's decision denying Conditional Use 24-006/Joy Blackman Revocable Trust

Issue, Description & Background: The Marion County Hearings Officer issued a decision on July 30, 2024, denying Conditional Use 24-006. As part of the land use process, the Marion County Board of Commissioners must receive official notice of the recommendation.

Financial Impacts: None

Impacts to Department & External Agencies: None

List of attachments: Hearings Officer Decision

Presenter: John Speckman

Department Head Signature: Brian Stahl

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of: ) Case No. CU 24-006  
)  
JOY BLACKMAN REVOCABLE TRUST ) **CONDITIONAL USE**

**I. Nature of the Application**

This matter is before the Marion County Hearings Officer on the Application of the Joy Blackman Revocable Living Trust for a Conditional Use to establish a non-farm dwelling on a 5.97-acre parcel in the SA (Special Agriculture) zone located in the 3300 block of Little Haven Lane S, Salem (T8S; R3W; Section 7B; Tax lot 800).

**II. Relevant Criteria**

Standards and criteria relevant to this Application are found in the Marion County Code, Title 17, especially Marion County Code: Chapter 17.137 Special Agriculture Zone.

**III. Public Hearing**

A public hearing was held on this matter on May 2, 2024. The Planning Division file was made part of the record. The following persons appeared and provided testimony at the hearing:

1.	John Speckman	Marion County Planning Division
2.	Mike Paluska	Attorney for Applicant
3.	Carrie Richter	Attorney for Appellant
4.	Mary Judith Upright	Appellant
5.	Ted Raszka	Appellant
6.	Michelle Raszka	Appellant
7.	Isabel Joslen	Opponent
8.	Joseph Vidra	Opponent
9.	Pamela Vidra	Opponent
10.	Daniel Gorrell	Opponent
11.	Chris Bailey	General Witness

No objections were raised as to notice, jurisdiction, conflict of interest, exhibits, evidence or testimony presented at the hearing. Additional submissions were included in the record and admitted as Exhibits:

Exhibit 1:	Letter from Carrie Richter
Exhibit 2:	Maps of Little Haven Lane (5 pages)
Exhibit 3:	Summary of Testimony by Ted Raszka
Exhibit 4:	Notice of Appeal by Joseph and Pamela Vidra
Exhibit 5:	Restated Roadway Access Agreement
Exhibit 6:	Statement of Dan and Lois Gorrell

The record was held open until May 9, 2024 for the Applicant to provide additional evidence, until May 16, 2024 for the Opponents to provide additional evidence. No new evidence would be permitted after May 16, 2024. The Applicant was permitted to submit any final argument by May 23, 2024.

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On May 16, 2024, on behalf of Mary Judy Upright, Carrie Richter submitted additional written arguments. On May 23, 2024, on behalf of the Applicant, Michael Paluska submitted final written arguments.

#### **IV. Executive Summary**

The Applicant seeks a conditional use permit to place a non-farm dwelling on a 5.97-acre parcel in the SA (Special Agriculture) zone located in the 3300 block of Little Haven Lane S, Salem (T8S; R3W; Section 7B; Tax lot 800). The subject property has remained under the ownership of the same family for nearly 50 years, and the proposed dwelling would remain in the family. Although the Applicant satisfies the criteria to allow the establishment of a non-farm dwelling on the subject property, extending the use of Little Haven Lane for use by five homes exceeds the threshold permitted by MCC 17.110.800. Without a variance, the Application is DENIED.

#### **V. Findings of Fact**

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

1. The subject property is designated Special Agriculture in the Marion County Comprehensive Plan and correspondingly zoned SA (Special Agriculture). The primary intent of both this designation and zone is to promote and protect commercial agricultural operations while also providing the opportunity for timber production and other uses that are compatible with agricultural activities.
2. The subject parcel consists of 5.97-acres of naturally forested hillside in the rural unincorporated area of south Salem. The forested area appears to consist of a mix of evergreen and deciduous trees. The slopes on this parcel are significant, and the geohazard overlay shows particularly steep slopes wrapping around the west, east, and south sides of the parcel. A south-pointing triangular section of the parcel based across the northern property line consists of relatively mild 2-point geohazard. The parcel is also within one of Marion County's SGO (Sensitive Ground Water) overlays indicating groundwater supply may be a concern now or in the future.

The access to the subject parcel is via an undeveloped easement that utilizes tax lots 2000, 2301, and 2300. Tax lot 2300 was partitioned twice, once in 2005 and again in 2008. Both new parcels had homes developed clustered together at the end of Little Haven Ln S. Tax lot 2000 was the subject of a measure 37/49 decision that has not been exercised, allowing that parcel to create two additional parcels and develop each with a dwelling.

3. The subject parcel was created in its current formation by partition in the fall of 1978 which legitimized the sale of this parcel and the description thereof which is included in the deed recorded in January 1978 on Reel 111 Page 1041 of the Marion County Book of Land Records and is therefore legal for land use purposes.

The Major Partition case (MJP78-078) divided a 10-acre parcel in the RA (Residential Agricultural) zone (a zone no longer existing in Marion County Code) into three parcels of approximately 2-acres, 2-acres, and 6-acres. At the time of the partition the land was jointly owned, and the partition was to accomplish division of this ownership. The subject parcel at this time was separated as described by the deed referenced above and came solely under the ownership of the Blackman family. The other two parcels created by this partition are accessed off of Inland Dr S.

When Marion County adopted an updated Comprehensive Plan in 1982 the RA (Rural Agricultural) zone was removed, and the AR (Acreage Residential) zone was applied to these two smaller parcels. At this time the subject parcel in this case (CU24-006) was changed to SA (Special Agriculture).

4. Properties directly surrounding the subject parcel to the north, west, and south are zoned SA, and parcels to the east are zoned AR. The adjacent AR parcel tract extends to the City of Salem UGB which is a half-mile to the east. The UGB is also a half-mile north of the subject parcel. Some of the SA parcels around the subject parcel have woodlots and most of those are simultaneously in use for rural residences. Many of the SA parcels around the subject parcel are solely in use for rural residences. A half-mile to the west is a large tract of AR zoned parcels that stretches to the Willamette River and western county line. Approximately one-half mile to the north of the subject parcel is the Illahe neighborhood within the City of Salem UGB. Between the subject parcel and Illahe are a couple SA zoned parcels under 10-acres with a couple acres each of personal orchards and/or fields for a few livestock animals. Half a mile to the south is another tract of AR zoned parcels that transitions into a few SA parcels in the same rural residential use off the same access road (Ballyntyne).

A quarter-mile west of the subject parcel is a 30-acre parcel with similar forest composition to the subject parcel. This 30-acre parcel had a wildlife habitat conservation plan approved in 2002 by AR02-055. The two parcels east of the habitat conservation area were both covered with timber forests up until 2016. Between 2016 and 2019 most of the trees (approx. 20 acres) were harvested on tax lot 100 which meets the subject parcel on its southwest corner. This area has been replanted but it is unclear from aerial photos if the replant was for Christmas tree or timber production. Between 2021 and 2023 about half of the trees (approximately 15-acres) were harvested on tax lot 1300, which is adjacent to the subject parcel on its southern property line. Based on aerial photos and the applicant statement, the clear-cut on tax lot 1300 has not been replanted. Due to the tree coverage and steep slopes on the subject parcel, the proposed homesite is screened and separated from these southern operations. North-adjacent to the subject parcel is a 10-acre stand of timber that may be harvested at a future date.

The most common agricultural use of the nearby SA parcels is production of Christmas trees. Just under a mile to the south of the subject parcel, on the other side of another tract of AR zoned parcels, is a nearly 200-acre parcel in use for grass seed or hay production. This is the closest parcel in commercial agriculture use. Farther to the south (2+ miles south of the subject parcel) are larger SA parcels in clear commercial agricultural use. The predominant land use around the subject parcel is for rural residences.

5. Marion County Soil Survey reports approximately 47.1% of the soils on the subject property as high value. The analysis lists a breakdown of the soils as follows:

<u>Soil Name</u>	<u>Soil Type</u>	<u>Soil Class</u>	<u>High Value</u>	<u>Soil Percent</u>	<u>Soil Acres</u>
Nekia silty clay loam 2-7% slopes	NeB	3	Yes	47.0%	2.8 acres
Nekia silty clay loam 20%-30% slopes	NeE	4	No	38.6%	2.3 acres
Nekia silty clay loam 30-50% slopes	NeF	6	No	14.3%	0.9 acres

6. The applicant proposes to establish a non-farm dwelling on the property.

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7. The Marion County Planning Division requested comments on the Application from various governmental agencies.

Marion County Public Works Land Development and Engineering Permits (LDEP) commented:

**ENGINEERING REQUIREMENTS**

- A. At the time of application for building permits an Access Permit will be required for obtaining access at the private access easement Little Haven Lane connection to public road Viewcrest Road.
- B. The subject property will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits.
- C. Utility work in the public right-of-way requires separate PW Engineering permits.

**ENGINEERING ADVISORY**

- D. The applicant should coordinate with the local Fire Department to confirm any Emergency Vehicle Access requirements given the fact that Little Haven Lane is quite narrow.

Marion County Building Inspection commented:

"No Building Inspection concerns. Permits are required to be obtained prior to development and/or utilities installation on private property. Depending on site conditions and proposed home location, a geotechnical assessment of soils and slopes for adequate support of the home may be required during plan review."

Marion County Septic Division commented:

"A septic site evaluation is required to establish a viable initial and repair area. A site evaluation may be applied for at the Marion County Public Works campus building 1."

City of Salem Fire Department commented:

"Items including fire department access and water supply will be required per the Oregon Fire Code at the time of development."

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

8. Marion County Planning states that currently four parcels with dwellings are addressed off Little Haven Lane. Marion County has interpreted MCC 17.110.800 to allow a property that has frontage on a public street to be considered to have direct access to the abutting public street even if the property uses a private driveway for access. Planning posits that the dwelling on Tax Lot 2000 has frontage on Viewcrest Rd S so the private drive does not "serve" Tax Lot 2000. Based on the frontage on Viewcrest Road S., the limitation of a private lane to not serve more than four dwelling units has not yet been met by Little Haven Ln S. Planning states that the proposed non-farm dwelling on the subject parcel would be the final dwelling developable without approval of a variance to MCC 17.110.800 - *Dwellings and all other buildings to be accessible to public street.*

9. Appellants and Opponents argue that MCC 17.110.800 limits the use of a private drive to serve development as follows:

*Every dwelling shall be situated on a lot having direct access by abutting upon a public street or a preexisting driveway of a width not less than 20 feet. A private drive shall not serve more than four dwelling units unless the parcels, on which those units are proposed to be placed, were established with the approval of Marion County in accordance with state law and Marion County ordinances prior to May 1, 1977, or were approved under Chapter 17.121 MCC, Planned Development.*

Appellant argues that the only direct access for the homes on tax lots 2000, 2300, 2301, and 2302 is through Little Haven Lane and that Little Haven Lane already serves four units, or the maximum capacity allowed by the Code. Although Lot 2000 abuts Viewcrest Drive, it is “served” or accessed by Little Haven Lane because Viewcrest Drive does not, and perhaps could not provide direct access.

10. Carrie Richter, attorney for Appellant, testified that the easement serves Tax Lot 2000, and because the easement is there, it cannot be concluded that Viewcrest provides access to Tax Lot 2000 and no driveway could be built from Viewcrest to serve Tax Lot 2000. Ms. Richter argues there are already four homes that are served by Little Haven Lane, and that a fifth home on the subject property cannot be established without a variance. The Appellant’s positions are supported by Ms. Richter’s May 2 and May 16 submissions, as well as testimony presented at the hearing. Ms. Upright’s appeal states that she has approached Planning regarding partitioning her land, but has been advised that adding a fifth dwelling with service on Little Haven Lane would be prohibited by MCC 17.110.800.

Ms. Richter and the Opponents address the fact that to allow the use of the subject property for the establishment of a non-farm dwelling relies on obtaining vehicular access to the property by using the existing Little Haven Lane private drive and by extending it approximately twice the distance of its current length which will require significant tree removal on a steep slope behind Tax Lots 2300 and 2301.

11. Appellants Ted and Michelle Raszka reside at 3238 Little Haven Lane, which is Tax Lot 2301. The Raszkas addressed their concerns that there are already four houses accessed by Little Haven Lane. The Raszkas stated that Tax lot 2000 does not have the ability to accommodate access to Viewcrest Drive, even though it has frontage. The Raszkas also indicated that the undeveloped access road is approximately 5-10 feet wide and widening the roadway would require excavation. The access beyond the easement area that serves the residences had not been used for decades. The Raszkas state that development of the undeveloped access roadway to access the proposed dwelling will require excavation on sloped and landslide area could result in geologic consequences to the area.
12. Joseph and Pamela Vidra reside at 3288 Little Haven Lane, which is Tax Lot 2300. The Vidras’ opposition to the application is based upon the fact that four dwellings are already served by Little Haven Lane and the fact that the engineering challenges of access to the proposed dwelling have not been adequately addressed. The Vidras are concerned about a slide risk to their home and state that a significant retaining wall would be required for the slope. The Vidras stated that there will be land destabilization from tree removal that would be required to develop the roadway. The Vidras submitted Exhibit 4 which addresses the engineering challenges associated with creating the easement road on Tax Lot 2300. Exhibit 4 also addresses the Restated Roadway Access and Easement Agreement (Exhibit 5) which provides that the “ungraveled easement” is approved for emergency use only.

13. Mary Judith Upright testified that she resides at 3197 Little Haven Lane, which is Tax lot 2000. Ms. Upright states that four houses are already served by Little Haven Lane and that she had been advised by Marion County that she could not partition her property for another dwelling because of the limitation of MCC 17.110.800.
14. Isabel Joslen testified that her daughter will be marrying Ms. Upright's grandson, and in considering a home for them, they went to Marion County Planning and were told that no house could be built near Ms. Upright's home because there are already four houses served by Little Haven Lane.
15. Daniel Gorrell testified that he lives at 3298 Little Haven Lane. Mr. Gorrell testified that Little Haven Lane is a single lane, gravel road that enters Viewcrest on a blind corner. Mr. Gorrell testified that there have been multiple accidents and crashes into the mailboxes. Mr. Gorrell testified that Little Haven Lane is not well-equipped to serve the houses that are presently served by Little Haven Lane, and the introduction of a fifth dwelling to be served by Little Haven Lane would increase the inherent danger. Exhibit 6 also includes a written statement by Mr. Gorrell in opposition to the Application.
16. Michael Paluska indicated the Applicant appreciates the concerns of the neighbors and wants a safe roadway for all the properties. However, because the road has not been built, it is not known if doing so is prohibitive. Mr. Paluska states that "difficulty" in improving the access does not indicate "impossibility" to improve the access. Mr. Paluska also notes that the criteria does not require the exact location of road construction for a conditional use permit and that permitting will address the issues associated with extension of the easement.

## **VI. Additional Findings of Fact and Conclusions of Law**

1. Applicant has the burden of proving all applicable standards and criteria apply as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(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 record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, Applicants have not met their burden and the application must be denied. If the evidence for every criterion is even slightly in Applicants' favor, the burden of proof is met and the application is approved.

2. Under MCC 17.119.100, the Planning Director has the power to decide applications for conditional uses. The Planning Director decided this matter on March 15, 2024.

Under MCC 17.119.140, after the Planning Director's action on the application, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's approval was dated March 15, 2024. Appellant Mary Judy Upright is an interested person and appealed the Planning Director's decision on March 27, 2024. Appellants Ted and Michelle Raszka are interested persons and appealed the Planning Director's decision on March 29, 2024. The appeals are timely.

3. Under MCC 17.119.150, on appeal of the Planning Director's decision, the hearings officer shall conduct a *de novo* public hearing on the decision. The hearings officer may hear and decide the matter.
4. 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. A deed recorded in the county records at Reel 1706, Page 497 shows the Joy M. Blackman Revocable Living Trust owns the subject property. The application was filed by appropriate persons. MCC 17.119.020 is satisfied.
5. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including all owners of the subject property. Joy Blackman, Trustee of the Joy M. Blackman Revocable Living Trust owns the subject property and signed the application. MCC 17.119.025 is satisfied.
6. Under MCC 17.119.070, before granting a conditional use, the director, planning commission or hearings officer shall determine:
  - A. That it has the power to grant the conditional use;
  - B. That such 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.
7. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. In the conditional use application "request" section, Applicant states a request to place a non-farm dwelling.
8. MCC 17.137.050 provides for Conditional Uses in a Special Agriculture Zone. MCC 17.137.050(A) includes a single-family dwelling or mobile home not in conjunction with farm uses, subject to the criteria and standards in MCC 17.137.060(B), 17.137.070, and MCC 17.137.100. Applicant's application is for a single-family, nonfarm dwelling on the subject property.
9. MCC Chapter 17.110 is the Marion County Rural Zoning Code. Its purpose is to provide and coordinate regulations governing the development and use of lands in the portions of Marion County outside acknowledged urban growth boundaries that implement and confirm to the County Comprehensive Plan. Its purpose is also to promote and protect the public health, safety and general welfare. MCC 17.110.003(A)(B).
10. MCC 17.110.800 *Dwellings and all other buildings to be accessible to public street* provides:

*Every dwelling shall be situated on a lot having direct access by abutting upon a public street or a pre-existing private driveway of a width not less than 20 feet. A private drive shall not serve more than four dwelling units unless the parcels, on which those units are proposed to be placed were established with the approval of Marion County in accordance with State law and Marion County ordinance prior to May 1, 1977, or were approved under ORS Chapter 17.121 MCC Planned Development.*

Marion County has interpreted MCC 17.110.800 to allow a property that has frontage on a public street not to be considered to be “served” by the private drive. In this case, because Lot 2000 abuts a public street, Applicant argues that the private drive, Little Haven Lane, only serves the three dwellings that do not abut a public road. That is, the Application is not limited by MCC 17.110.800.

Appellants and Opponents argue that the only “direct access” for the homes on Little Haven Lane (Tax Lots 2000, 2300, 2301, and 2302) is through Little Haven Lane. Appellants argue that the express language of MCC 17.110.800 prohibits a private drive from servicing more than four homes.

Applicant and Planning’s interpretation of the provision relies on the language “*having direct access by abutting upon a public street or a pre-existing private driveway.*” Planning’s interpretation is not unreasonable if the frontage to the public street could provide direct access. However, the more reasonable interpretation of MCC 17.110.800 is that dwellings must be situated on a lot having direct access to the abutting public street that actually permits access or a pre-existing private driveway. (emphasis added) The public street abutting the lot must be capable of providing direct access to the lot. This interpretation is consistent with Ms. Upright’s experience with Planning in seeking to partition her property to add another dwelling.

In this case, the only access to the dwelling on Tax Lot 2000 is exclusively Little Haven Lane. Although Tax Lot 2000 abuts Viewcrest, a public street, Tax Lot 2000 does not have “direct access” to the public street. Tax Lot 200 has never used Viewcrest for direct access and is exclusively served by a private drive, Little Haven Lane.

Exhibit 5 is a Restated Roadway Access and Easement Agreement for Little Haven Lane. The parties to the agreement include Ms. Upright, the Vidras, the Raszkas, and the Harts, who resided at 3298 Little Haven Lane, the property now owned by Dan and Lois Gorrell. These are the parties who use the easement to access their properties and are responsible for maintenance of the easement/private drive/ Little Haven Lane.

Little Haven Lane currently serves four homes and if another dwelling was established, the private drive would serve more than four dwellings which is prohibited by MCC 17.110.800

9. MCC 17.137.010 provides the SA 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 present no significant conflicts and allow 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 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.*

10. The following code, 17.137.060(A), applies 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.*

The access to, and location of, the proposed dwelling will cluster it with adjacent rural residential uses. The 130-foot setback from the northern property line will create a buffer between the proposed dwelling and the stand of timber to the north. The access to the subject parcel is achieved through an existing, although undeveloped, easement extending Little Haven Ln S across AR zoned parcels with dwellings. There are no adjacent agricultural uses that could be disturbed by the proposed placement of a non-farm dwelling.

A farm/forest declaratory statement will be a condition of approval to ensure the property owner, and future owners, of the subject parcel are aware that the priority of the SA zone is agricultural and/or timber uses, and that owners and inhabitants of the proposed non-farm dwelling shall not infringe, inhibit, or complain about the effects of these uses on the subject dwelling.

Most of the lands surrounding the subject property are not devoted to farm or forest use. With respect to the parcels to the south and southwest that by be considered to be devoted to some type of resource use, the topography of the area is such that it is unlikely that there is any accepted farm or forest practices that would occur adjacent to the subject property. One additional dwelling in the area would not have a significant effect that any of the other residences may have had on the farming and forest uses in the area.

The use of the subject parcel for siting a non-farm dwelling using the existing easement to access the proposed building area with the modified setbacks of 130-feet to the north and 100-feet to the east, west, and south, will not cause change in, or significantly increase the cost of, farm or forest uses on surrounding parcels in the area. The criterion is met.

*2. Adequate fire protection and other rural services are, or will be, available when the use is established.*

Applicant states that the subject parcel is within the Salem Suburban Fire District and the Marion County Sheriff's Department. Appellants state that Applicant has not provided evidence upon which it could be determined if obtaining fire access from the fire district is feasible. Salem Fire Department commented that fire department access and water supply will be required prior to development. The subject property is served by the Salem Suburban Fire District. Additional findings to support a determination that "adequate" fire protection could be provided. Development of the site requires fire access from the fire department, and the criteria could be met if fire department access and water supply is established.

Applicant states that the subject parcel will have a well, septic, and electrical service on the subject property. Electrical service, provided by PGE, is available on Little Haven Ln S and could be extended via the undeveloped easement that travels over parcels 083W07A002000, 083W07A002301, and 083W07A002300 to the subject parcel. Permits for a well will need to be filed for with the Oregon Water Resources Department. Permits related to a septic system will

need to be filed with Marion County Septic Division. All required rural services may be attained for the proposed dwelling to be established. The criterion is met.

Permitting will address the factual issues raised by the Appellants.

*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.*

The Applicant states that most of the parcel will be left wooded because harvesting the timber on this property is cost-prohibitive due to the slopes present. Development of access, and fuel breaks will require some timber be harvested. Due to those geohazards on this property, the site of the proposed dwelling is limited to an area in the middle northern section of the property. Staff has stated that siting the proposed dwelling on this area of the property is not expected to have any deleterious effect on the soils or slope stability.

The subject parcel is not within the Big Game Overlay. This property is within the Sensitive Groundwater Overlay and a Declaratory Statement acknowledging this will be a condition of approval. The criterion may be met with respect to the proposed dwelling site itself. However, the inquiry must also address the fact that the use requires a significant extension to the access road easement. The extension will require significant land clearing and slope regrading through a significant landslide area as supported by Exhibit 3, Map Pages 3-4.

The Application is for placement of a non-farm dwelling. Appellants argue that the improvements necessary for the use does not meet the criteria because Applicant has not addressed the fact that the use requires constructing adequate vehicle access through a significant landslide area. Appellant argues that slope stability concerns must be addressed before a determination of whether the criteria is met.

However, Marion County Building Inspection commented that depending upon site conditions, a geotechnical assessment of soils and slopes for adequate support of the home may be required during plan review. This would include access to the home, and the criteria could be met. Tree removal and site grading within the steep slope area will require a Geological Hazard Overlay Permit. Concerns regarding potential slope stability issues can be addressed through the permit process. This criterion is met.

*4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.*

Any noise associated with the proposed development, post-construction, will be the normal noise of a dwelling in residential use. Based on the proposed site, the nearest dwellings will be over 500 feet away and shielded by trees. Any noise created by this dwelling will not have an adverse impact on the nearby land uses. The criterion is met.

*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.*

There are no water impoundments on or near the subject property, nor are there any aggregate sites in the surrounding area. The criterion does not apply.

9. Non-farm dwellings are subject to MCC Section 17.137.050(A). One of the requirements is that the proposed dwelling meet the provisions listed in 17.137.060(B), which reads as follows:

*B. Non-Farm Dwellings. The following additional criteria apply to non-farm dwelling requests:*

*1. The dwelling will be sited on a lot or parcel that is predominantly composed of Class IV through Class VIII soils that would not, when irrigated, be classified as prime, unique, Class I or Class II soils. Soils classifications shall be those of the Soil Conservation Service in its most recent publication, unless evidence is submitted as required in MCC 17.136.130.*

Marion County Soils Analysis, based on NRCS (Natural Resources Conservation Service) soil data, reports that the subject parcel is composed of 52.9% non-high value soils consisting of respectively 38.6% NeE (Nekia silty clay loam with 20%-30% slopes) which is a Class IV soil and 14.3% NeF (Nekia silty clay loam with 30%-50% slopes) which is a Class VI soil. Nekia silty clay loam classifications with slopes above 20% are not listed on the NRCS table of high value soils when irrigated in Marion County. The criterion is met.

*2. The dwelling will be sited on a lot or parcel that does not currently contain a dwelling and was created before January 1, 1993. The boundary of the lot or parcel cannot be changed after November 4, 1993, in any way that enables the lot or parcel to meet the criteria for non-farm dwelling.*

The parcel was created by partition (MJP78-078) in 1978 to legitimize the description of the property as conveyed in a deed recorded earlier the same year on Reel 111 Page 1041 of the Marion County Book of Land Records and has existed in this configuration ever since then. The property does not contain a dwelling. The criterion is met.

*3. The dwelling will not materially alter the stability of the overall land use pattern of the area. In making this determination the cumulative impact of possible new non-farm dwellings on other lots or parcels in the area similarly situated shall be considered. To address this standard, the following information shall be provided:*

*(a) Identify a study area for the cumulative impact analysis. The study area shall include at least 2,000 acres or a smaller area not less than 1,000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch 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;*

The applicant provided a study area encompassing 2,000-acres of surrounding land. This study area included only properties zoned for Farm Use. Lands zoned for rural residential or other non-resource uses were excluded. Information supplied by the applicant, and verified by planning staff, indicates that there is no non-resource zoned land applied to the study area and that the Applicant's report meets the required area for resource zone analysis.

The applicant has indicated this study area is representative of the land use pattern surrounding the subject parcel. Uses within the study area include rural residences, timber lots, natural woods, Christmas tree lots, and fields of row crops. Staff concludes that the area presented by the applicant is a fair representation of the surrounding area and is sufficient to arrive at a sampling of the land use pattern.

*(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 dwellings that could be approved under MCC 17.136.050(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;*

The subject parcel is within an area near the edge of the City of Salem UGB, an area which contains several large tracts of Acreage Residential zoned parcels. As a result, the 2,000-acre study area creates a meandering shape that wraps around these tracts and extends around and above peninsulas of residential-neighborhoods. The largest contiguous space of the study area exists in the southern half.

The Applicant noted that due to the steep slopes and low value soil, most of the parcels included in the 2,000-acre study area have woodlots and are not in agricultural use. Based on Marion County aerial photographs of the region, very few of the woodlots appear to be intentionally planted stands of timber. One of the stands is directly north adjacent to the subject parcel. South adjacent is a clearcut that occurred between 2021 and 2023. Southwest adjacent of the subject parcel was a clear cut from between 2016-2019 that has been replanted. It is unclear from aerial photographs if this parcel has been replanted with timber or with Christmas trees. Roughly half of the wooded areas within the study area are covered with deciduous trees and irregularly growing evergreen trees. These naturally wooded areas are not considered to be in timber use. The largest stands of timber range from 10-15 acres and are on properties that contain dwellings.

The most common agricultural use in the study area appears to be for the purpose of harvesting Christmas trees. The largest Christmas tree operation in the area is only partially within the study area. The entire operation consists of approximately 60-acres of Christmas trees planted across 3-parcels which total over 200-acres. This operation is on the southernmost edge of this 2000-acre study, and less than half of the total operation is within the study area.

The largest single parcel in agricultural use is also on the southernmost edge of the 2000-acre study. This parcel is almost 200-acres and has 127-acres devoted to grass seed or hay production, and 20-acres devoted to Christmas trees. It is worth noting that a few acres of the Christmas tree lot falls outside of the study area. The other two large parcels in agricultural use are both on the northernmost edge of the 2000-acre study area. These parcels are contiguous and along the Willamette River north of Illahe. One is 97-acres, and the other is 182-acres, both appear in use for row crops. The northernmost parts of the 182-acre parcel falls outside of the study area.

A total of 137 parcels were included in the study area. Of these included parcels, 124 are zoned SA and 13 are zoned EFU. Only five parcels in the study area are larger than the minimum 80-acres for SA and EFU zoned parcels. 60% of the parcels are under 10-acres in size.

Of the parcels included in the study area, 92 have at least one dwelling and there are a total of 101 dwellings on these 92 parcels. 84 of those parcels had a dwelling prior to 1993. A total of 8 parcels have been developed with homesites in the last 30 years. Since

1993, four non-farm dwellings have been approved within the study area. Three of these were approved in the 90s, and the fourth in 2004. Also, since 1993, three lot of record dwellings were approved, and three replacement dwellings were approved. While not permanent, four hardship dwellings have been approved in the study area since 1993.

Seven parcels within the study area that have neither a dwelling nor predominantly high value soils. These parcels would therefore potentially be able to qualify for additional non-farm dwellings. However, five of these parcels were involved in Measure 37/49 claims. As a result, these parcels would develop single family dwellings as a result of their Measure 49 decisions, and not through application for non-farm dwellings. A total of seven dwellings may result from these Measure 49 orders. The remaining two parcels that could potentially qualify for non-farm dwellings are both of relatively large sizes and in timber use.

The Applicant contends that the most common use of parcels within the study area is for rural residential purposes, and that allowing development of a single-family dwelling on the subject parcel would not destabilize the less common farm and timber uses in the area. The commercial agricultural uses within the study area are restricted to the northern and southern most parcels, all three of these operations are 0.7-0.9 miles from the subject parcel on the other side of rural residential clusters. The proposed dwelling would be consistent with the development pattern that has occurred on the SA and EFU parcels surrounding the subject parcel.

*(c) Determine whether approval of the proposed non-farm dwellings together with existing non-farm dwellings will materially alter the stability of the land use pattern. 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, or lease farmland, or acquire waste 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.*

Approval of this application would bring the total number of post-1993 non-farm dwellings within the study area to five. The subject parcel is 5.97-acres and would fit within the current land use pattern of small acreage homesites scattered through the area. The subject parcel has never had a dwelling not been involved in agricultural use.

If the other two parcels that could potentially develop non-farm dwelling were able to do so, they would not be able to materially alter the land-use pattern in the area. The dominant land-use pattern in this area is for rural residential use and has been for more than 30 years.

The proposed dwelling would be built within an existing cluster of residences, accessed on private lane that serves adjacent AR zoned parcels. The proposed dwelling site would be shielded by trees and topography from adjacent SA zoned parcels. These adjacent parcels while involved in timber use, do not appear to be involved in agricultural uses. The access and isolation of the proposed dwelling shield it from the scattered agricultural use of Christmas tree production in the area. The parcels in the study area involved in row crop production are all on the other side of residential neighborhoods from the subject parcel, so it is unreasonable to say that the proposed dwelling will have any effect on those farming operations. The proposed dwelling will not make it more difficult for the few existing farming activities to continue and would not materially alter the land use stability of the area. The criterion of MCC 17.137.060(B)(3) are met.

10. In addition, non-farm dwellings shall be subject to the following code as provided for in 17.137.070, Non-farm dwelling requirements:

*(A) Special Setbacks.*

*1. Dwellings. A special dwelling setback of 200 feet from any abutting parcel in farm use or timber production is required.*

*2. Accessory Buildings. A special setback of 100 feet is required for buildings accessory to a dwelling from any abutting parcel in farm use or timber production.*

*3. Adjustments. The special setbacks in subsections (A)(1) and (2) of this section may be reduced if it is determined, concurrently with any land use application or as provided in Chapter 17.116 MCC, that a lesser setback will meet the following review criteria for alternative sites:*

*a. The site will have the least impact on nearby or adjoining forest or agricultural lands.*

*b. The site ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized.*

*c. The amount of agricultural and forestlands used to site access roads, service corridors, the dwelling and structures is minimized.*

*d. The risks associated with wildfire are minimized.*

Applicant proposes reducing the setbacks from 200-feet to 100-feet considering the dimensions of the property (an imperfect square of approximately 500 by 500-feet) and the significant slopes which create geohazard areas across much of the eastern, western, and southern sides of the parcel. The most reasonable buildable area is the middle of the northernmost third of the parcel. This area is closest to where the easement enters the property and is the flattest area, though still within the geohazard 2-point overlay. This site would put the proposed dwelling potentially 100-feet from the timber lot directly north-adjacent to the subject property. The applicant would have to sign a farm/forest declaratory statement as a condition of approval, in which they would recognize these timber uses are a priority above a non-farm dwelling in this zone and shall not be interfered with or complained about.

The proposed location would allow for the existing easement to be used, which would travel over AR zoned land that is not being used for agricultural or timber purposes. The subject parcel is served by the Salem Suburban Fire District and will comply with all relevant fire district code imposed by the SSFD.

It is generally considered prudent to have 2-acres to be able to site a dwelling, septic tank and drainfield, replacement drainfield area, and a well. If the 200-foot setbacks were imposed, the practical buildable area would be roughly a quarter of an acre. The buildable area increases to almost 1-acre with the proposed 100-foot setbacks. The prohibitive geohazard slopes present on the eastern, western, and southern portions of this property make the northern setback the primary variable in potentially developable space on this parcel.

The northern parcel has a 10-acre stand of timber directly adjacent to the subject parcel. Depending on how the Applicant would implement the fuel breaks imposed by 17.137.070(B),

the effective setback from the northern parcel will end up being at least 130-feet. The primary safety zone is 30 feet around all structures, with some slope related extensions that may affect this property depending on the siting of the proposed dwelling. The secondary fuel break area is 100-feet around the primary safety zone. The secondary fuel break area requires pruned and spaced vegetation so that fire would not spread between the crowns of trees, or between trees via vegetation between them.

To reduce the setback on the northern parcel below 130ft would conflict with the criteria of 17.137.070(A)(3)(d) and 17.137.070(B)(3) due to the requirements to meet the primary and secondary fuel break areas.

A reduced special setback of 130-feet from the northern property line, and 100-feet from the western and southern property lines for the proposed dwelling and any future accessory structures would maintain the intent of the Special Setback Code and meet the criteria in subsection (A)(3)(a-d). The special setbacks do not apply to the eastern property line adjacent to parcels in the AR zone. These criteria are met.

*4. The special setback in subsection (A)(1) of this section shall not be applied in a manner that prohibits dwellings approved pursuant to ORS 195.300 through 195.336 nor should the special setback in subsection (A)(1) of this section prohibit a claimant's application for homesites under ORS 195.300 through 195.336.*

The proposed dwelling is not subject to/a part of a Measure 37 or 49 claim. The criterion does not apply.

(B) *Fire Hazard Reduction. As a condition of approval for any non-farm dwelling located closer than 200 feet to timber, the owner shall be required to provide continuing fire hazard management in accordance with Chapter 3 of "Fire Safety Consideration for Development in Forested Area," 1978, and any revisions thereto.*

The updated version of the standards within the document above is referenced in the EFU-equivalent of this section of code: 17.136.070 (B). "Fire Hazard Reduction. As a condition of approval for any non-farm dwelling located closer than 200-feet to timber, the owner shall be required to maintain a primary and secondary fuel-free break area in accordance with the provision in "Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads" dated March 1, 1991, and published by the Oregon Department of Forestry."

The property north of the subject parcel has approximately 10-acres devoted to timber production directly adjacent to the subject parcel. The primary and secondary fuel-free break areas shall be conditions of approval. The criterion is met.

(C) *Prior to issuance of any residential building permit for an approved non-farm dwelling under MCC 17.136.050(A), evidence shall be provided that the county assessor has disqualified the lot or parcel for valuation at true cash value for farm or forest use; and that the additional tax or penalty has been imposed, if any is applicable, as provided by ORS 308A.113 or 308A.724 or 321.359(1)(b), 321.842(1)(A) and 321.716. A parcel that has been disqualified under this section shall not requalify for special assessment unless, when combined with another contiguous parcel, it constitutes a qualifying parcel.*

The criterion can be met with a condition of approval: the applicant shall submit evidence to Marion County Planning that the property has been disqualified from farm/forest

deferral by the Marion County Tax Assessor's Office prior to Planning approval of a building permit. The criterion is met.

11. Non-farm dwellings must also meet the standards in MCC 17.137.100, which are listed below:

(A) *Maximum Height.*

1. *Dwellings: 35 feet.*
2. *Farm-related structures on farm parcels: none.*
3. *Nonresidential and non-farm structures: 35 feet unless they are in conjunction with conditional uses allowed in MCC 17.137.050, and a greater height is requested and approved as part of the conditional use permit.*

Compliance with this shall be verified at the time of building permits. The criteria can be met.

(B) *Minimum Setbacks. Except as required in MCC 17.137.070(A), the following setback requirements shall*

*be implemented for all new structures other than farm-exempt buildings, signs and fences:*

1. *Rear Yard. A minimum of 20 feet.*
2. *Side Yard. A minimum of 20 feet, except for lots or parcels of one-half acre or smaller created prior to January 1, 1994, in which case the side yard setback shall be five feet.*
3. *Front Yard. A minimum of 20 feet. When by ordinance a greater setback or a front yard of greater depth is required than specified in this section, then such greater setback line or front yard depth shall apply (See Chapter 17.112 MCC).*

The dwelling and any future accessory structures shall be subject to MCC 17.137.070(A), as adjusted in the conditions of approval. Therefore, these criteria do not apply.

(C) *Declaratory Statement. 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."*

A declaratory statement could be made as a condition of approval. The criteria could be met.

If MCC 17.110.800 did not restrict the approval of the application, the following conditions would have been imposed and must have been met before a building permit could be obtained. The following conditions should be imposed if a variance is obtained:

1. The applicant shall obtain approval for all permits, including subsurface sewage, as required by the Marion County Building Inspection Division.
2. The proposed dwelling and any future accessory structures shall maintain a 130-foot minimum setback from the northern property line and a 100-foot minimum setback from the western and southern property lines.
3. Prior to obtaining building permits, the applicant must provide evidence to the Planning Director that the county Assessor's Office has permanently disqualified the lot or parcel for valuation at true cash value for farm or forest use; and that the additional tax or penalty has been imposed, if any is applicable, as provided by ORS 308A.113 or ORS 308A.724 or ORS 321.359(1)(b), ORS 321.842(1)(A) and 321.716.
4. Prior to issuance of a building permit for the new dwelling, the applicants shall sign and submit a Farm/Forest & SGO & Geohazard 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. As a condition of approval for any non-farm dwelling located closer than 200 feet to timber, the owner shall be required to maintain a primary and secondary fuel-free break area in accordance with the provision in "Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads" dated March 1, 1991, and published by the Oregon Department of Forestry.
6. The dwelling shall be addressed 3308 Little Haven Ln S, effective when building permits are applied for. This address is subject to change if the driveway location changes.


#### **VII. 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 for a non-farm dwelling because the private drive that would be used to serve the proposed dwelling already serves four dwelling units.

#### **IX. 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, Oregon) by 5:00 on the 14th day of August, 2024. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500.00, and must state wherein this Order fails to conform to the provisions of the applicable code provision(s). If the Board denies the appeal, \$300.00 of the appeal fee will be refunded.

DATED this 30<sup>th</sup> day of July, 2024.

  
Jill F. Foster  
Marion County Hearings Officer

## **CERTIFICATE OF MAILING**

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

Joy M. Blackman Revocable Trust  
3197 Little Haven Lane S  
Salem, OR 97302

Michael Paluska  
1820 Commercial St SE  
Salem, OR 97302

Carrie Richter  
1000 SW Broadway, Suite 1910  
Portland, OR 97205

Ted Raszka  
3238 Little Haven Ln. S  
Salem, OR 97302

Joseph Vidra  
3288 Little Haven Ln. S  
Salem, OR 97302

Daniel Gorrell  
3298 Little Haven Ln. S  
Salem, OR 97302

Chris Baily  
4156 Riverdale Rd. S  
Salem, OR 97302

Judy Upright  
33197 Little Haven Ln S  
Salem, OR 97302

Isabel Joslen  
4565 Matthews Loop  
Salem, OR 97302

Roger Kaye  
Friends of Marion County  
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1000 Friends of Oregon  
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Area Advisory Committee #1 (via email)  
laulehine@gmail.com  
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### **County Agencies Notified:**

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Tax Collector (via email)  
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ADhillon@co.marion.or.us

Surveyor's Office (via email)  
KInman@co.marion.or.us

Fire District: (via email)  
salemfire@cityofsalem.net

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School District: (via email)

[Fridenmaker\\_david@salkeiz.k12.or.us](mailto:Fridenmaker_david@salkeiz.k12.or.us)

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[JTaylor@co.marion.or.us](mailto:JTaylor@co.marion.or.us)

[ccaballero@co.marion.or.us](mailto:ccaballero@co.marion.or.us)

**State Agencies Notified:** (via email)

DLCD

[hilary.foote@dlcd.oregon.gov](mailto:hilary.foote@dlcd.oregon.gov)

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 \_\_\_\_\_ day of July, 2024 and that the postage thereon was prepaid.

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Administrative Assistant to the  
Hearings Officer