

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of) Case No. AR 24-012
)
Glen W. and Marjorie Morley Revocable Trust) **ADMINISTRATIVE REVIEW**

ORDER

I. Nature of the Application

This matter came before the Marion County Hearings Officer on the Application of the Glen W. & Marjorie Morley Revocable Trust for an administrative review to place a lot of record dwelling on a 4.66-acre parcel in a SA (Special Agriculture) zone located in the 2400 block of Everett Dr S, Salem (T8S; R3W; Section 20B; Tax lot 900).

II. Relevant Criteria

The standards and criteria relevant to this Application are found in the Marion County Code (MCC), Title 17, especially MCC 17.137 (Special Agriculture Zone) and 17.137.030(D) (Lot of Record Dwellings).

III. Hearing

A public hearing was held on this matter on July 18, 2024. At the hearing, the Planning Division file was made a part of the record. The following persons appeared and provided testimony:

- | | | |
|----|----------------|---------------------------------|
| 1. | John Speckman | Marion County Planning Division |
| 2. | Norman Bickell | Representative for Applicant |
| 3. | Linda Morley | Applicant |

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at the hearing. No documents were entered into the record as exhibits.

IV. Executive Summary

Applicants request an administrative review to place a lot of record dwelling on a 4.66-acre parcel in a SA (Special Agriculture) zone located in the 2400 block of Everett Dr S, Salem. Applicants have met the burden of proving that the criteria to place a lot of record dwelling in the Special Agriculture zone have been met. The Administrative Review Application is **APPROVED**.

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 located on Everett Dr S. The property is entirely covered by a woodlot planted around 2010 that stretches across three other parcels to west of 1.5-acres each. The subject parcel is within the Sensitive Groundwater Overlay (SGO). There is a small section of the westernmost part of the subject parcel that is zoned AR (Acreage Residential).
2. Adjacent properties to the north and east are zoned SA and composed of small farms with rural homesites. The north adjacent parcel is itself north adjacent to the City of Salem Urban Growth Boundary (UGB) and a recently developed subdivision. Adjacent parcels to the west are zoned AR and contain extensions of the woodlot present on the subject parcel. On the other side of the woodlot are rural homesites. The south adjacent parcels are zoned AR and in use for rural homesites.
3. The Marion County Soil Survey indicates that the subject parcel has 100% high value soils consisting of:

81% Jory silty clay loam 7-12% slopes (Class 2)
15.3% Nekia silty clay loam 2-7% slopes (Class 3)
3.7% Abiqua silty clay loam 0-3% slopes (Class 1)

4. Applicant proposes to place a lot of record dwelling on the subject parcel.
5. The Marion County Planning Division requested comments on the Application from various governmental agencies. The following comments were received:

Marion County Land Development, Engineering, and Permitting (LDEP) requested the following be included:

ENGINEERING REQUIREMENTS

- A. An Access Permit will be required at the time of application for building permits.
- B. The subject property will be assessed Transportation System Development Charges (TSDCs) and Parks fee upon application for building permits.
- C. Utility power main and service extensions in the public right-of-way require a permit from PW Engineering.

ENGINEERING ADVISORIES

- D. Everett Drive is a Local Access Road not maintained by Marion County.
- E. Everett Drive is of substandard width. The local fire department may place certain conditions on issuance of building permits due to potentially restricted access.

Marion County Building Inspection commented: “No Building Inspection concerns with proposal according to the application submitted. Permit(s) are required to be obtained prior to development and/or utilities installation on private property.”

Marion County Septic Division commented: “A Site Evaluation is required to establish an initial and repair area prior to an installation-construction permit.”

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 did not respond or stated no comment on the proposal.

VI. Additional Findings of Fact and Conclusions of Law

1. 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.

2. Marion County Code (MCC) 17.137 provides for Special Agriculture (SA). The SA 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 SA zone is intended to allow uses that are compatible with agricultural activities, to protect forests, scenic resources, and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.
3. MCC 17.137.030 provides for dwelling that may be established in the SA zone with the filing of the declaratory statement in MCC.17.137.100(C), subject to the approval of the director, based on satisfaction of the standards and criteria listed for each type of dwelling subject to the procedures in MCC Chapter 17.115.

4. MCC 17.115.110 provides that when a determination about a proposed use, structure or the legality of a parcel cannot be made without interpretation or the exercise of factual, policy, or legal judgment, the proposed use, structure, or the legality of a lot or parcel may be reviewed as an administrative review.
3. MCC 17.137.030(D) allows a lot of record dwelling, a single-family dwelling, subject to meeting specific standards and criteria. The standards and criteria of MCC 17.137.030(D) include:
 - (1) *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 subject property was purchased by Glen and Margie Morley in 1973 as evidenced by a Warranty Deed recorded at Volum 757, Page 592. The property remained in their ownership through their trust until they passed away. Glen Morley passed away in 2019, and Margie Morley passed away in 2023. The trustee for the Glen W. and Marjorie Morley Revocable Living Trust is now Glen and Margie’s daughter, Linda Morley. The criteria stated in MCC 17.137.030(D)(1)(a), (b), and (c) are satisfied and the criterion is met.

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

The subject parcel does not contain a dwelling. The criterion is met.

- (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.*

The subject parcel is contiguous with property in the same ownership, but zoned AR. Lot-of-record dwellings are not applicable to the AR zone. Therefore, for the purposes of this administrative review, the contiguously owned parcels are not considered a tract because they are not contiguously zoned. The criterion is met.

- (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.*

This criterion will not apply because the subject parcel is not a part of a tract of SA zoned parcels. The contiguously owned AR zoned parcels are legal lots and not considered as a part of the 2,000-acre study. The criterion does not apply.

- (5) *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 subject property is not located within a floodplain, greenway, or big game habitat area. The subject property and proposed dwelling will comply with the provisions of the SA zone, which implement the standards of the Special Agriculture designation in the Marion County Comprehensive Plan. The criterion is met.

- (6) *The proposed dwelling will not:*

- (1) *Exceed the facilities and service capabilities of the area.*
- (2) *Create conditions or circumstances contrary to the purpose of the Special Agriculture zone.*

Applicant acknowledges that the proposed dwelling would rely upon a well and septic to provide water and sewer services. Well and septic to provide these services will require permitting through Marion County Septic and the Oregon Department of Water Resources. The property is within the Sensitive Groundwater Overlay which does not require review for lot-of-record dwellings. As a condition of approval, a declaratory statement will be required acknowledging the parcel is within the SGO zone and groundwater may be limited. Marion County is not responsible for deepening or replacing wells that fail to produce an adequate supply of groundwater.

The parcel is served by the Salem Suburban Fire Department and the Marion County Sheriff's Office. Everett Dr S is a non-county road within a public right of way. This is a local access of substandard width that is not maintained by Marion County. Development of this parcel will require adequate fire department access so as not to exceed the service capabilities of the area.

The purpose of the Special Agriculture zone is for preservation of farm and forestland in areas of mixed high and low value soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites. This is an accurate description of the area around the subject parcel.

Lot of record dwellings are a permitting use in the SA zone, subject to standards being addressed in these criteria. If all criteria of MCC 17.137.030(D) are met, the proposed lot of record dwelling would not create conditions or circumstances contrary to the purpose of SA zone. The criterion is met.

- (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.*

Applicant's representative has acknowledged this criterion. The criterion is met.

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

The applicant's representative has acknowledged this criterion and it shall be a condition of approval. The criterion is met.

- (9) *The lot or parcel on which the dwelling will be sited is not high-value farmland as defined in Section 137.130(D); or*

The subject parcel is located on high-value farmland. This criterion does not apply.

- (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) and:*

The lot is predominantly Class II Jory high-value soil and is not listed in MCC 17.137.130(D)(2) or (3). The remainder of the standards and criteria stated in MCC 17.137(D)(10) are not applicable. This criterion does not apply.

- (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) and:*

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 demonstrate 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 land 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

The subject parcel is 4.66 acres and is planted in trees that qualify for timber deferral. The subject parcel is currently entirely in use for timber production. There are no steep slopes or other specific extraordinary physical circumstances related to the land itself. The timber on the parcel could be harvested and replanted. The SA zone purpose explains that the “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.” While the current use for timber is aligned with the goal of the SA zone, this criterion specifies “farm uses”.

The north and east adjacent SA parcels are in small farm and rural residential use. The subject parcel’s size and the cost of returning from timber production to farm use create a situation where the economic potential is significantly limited. Applicant states that farm use is unlikely on this parcel. The subject parcel is directly north of a large area of AR zoned land containing dwellings, which is a limitation to farming activities on the subject property. The criterion specifically requires that the subject parcel cannot be practicably managed for farm use, and references extraordinary circumstances inherent in the land as reasons that make farming a parcel impracticable.

In response to Marion County Planning staff request, Applicant provided supplemental information to further address this criterion. Applicant supplied an addendum to detail impediments to agricultural use in the subject parcel.

The subject parcel is within the Sensitive Groundwater Overlay and does not have water rights, which Applicant posits precludes the option of farming any irrigated crops.

Equipment to facilitate farming this parcel would have to access it via a non-county road (Everett Dr S), or be housed in a storage facility on site. Onsite equipment storage would further diminish the available land for farming on the small parcel. Applicant attests that this roadway is a public gravel road. Marion County GIS maps illustrate that the finished road surface is approximately 10 feet wide. A staff visit confirmed that Everett Dr S is extremely narrow. It is not possible to turn around even a small vehicle without utilizing one of the

driveways. Transporting tractors and other farm equipment would be difficult, cost-prohibitive, and the possibility of non-farm conflict is particularly high due to the narrow roadway and level of development in the area.

There are two homesites directly south of the subject parcel. One dwelling is less than 50-feet away, and the other is just under 110-feet away, from the southern property line. Applicant states that this proximity would make for difficult management of commonly applied farm related chemicals such as pesticides, herbicides, fungicides, and fertilizers on the subject parcel.

Applicant argues that the distance of the subject parcel from other commercial farm operations, difficult access, and amount of rural residential development in the area, precludes the property from consideration for addition to any nearby farm operations.

This criterion is specific in stating that size and economic potential are not factors in determining impracticability of a parcel to be farmed. While none of the extraordinary physical limitations listed in the criterion are present on this parcel, there are physical barriers that separate the subject lot from agricultural land. The rural residential uses that surround the subject parcel separate it from nearby commercial agricultural uses. The unique combination of issues regarding access to water, access to the parcel itself by farm equipment, and rural residential development in this area create an undue hardship for this parcel to be managed for farm use.

The unique combination of factors inherent in the location of the subject parcel creates a physical barrier rendering farm use impracticable. The criterion is met.

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

There are no directly adjacent commercial agricultural parcels. There are small farms directly north (12-acres) and east (6-acres) of the subject parcel with pasture for livestock on the northern parcel. The primary use of surrounding parcels is for rural residential purposes. The existence of rural residences, and dense suburban development with the UGB, directly adjacent to these farm properties suggests that the proposed additional rural residence will not change or significantly increase the cost of the farm practices occurring.

The AR zoned parcels to the west, under the same ownership as the subject parcel, are in use for timber production in conjunction with the subject parcel. The AR allows for a single-family dwelling to be developed on each of the parcels. These parcels are 1.5-acres, and it is reasonable to assume that economic incentive will

drive residential development after the timber is harvested. Therefore, it is not the development of the subject parcel that would force a significant change in use, nor increase the cost of these forest practices, but the relative economic value of permitted uses for parcels sized and zoned as they are that will likely end the current forest use on this east-adjacent tract of AR zoned parcels in timber production. The criterion is met.

iii. *The dwelling will not materially alter the stability of the overall land 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 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 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, and 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 nonirrigated 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.

Applicant submitted a cumulative impact analysis with a 2000-acre study area map that was provided by Marion County Planning. The purpose of this analysis is to determine whether the proposed dwelling would 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 materially alter the stability of the overall land use pattern in the area. The first portion of this is addressed in 17.137.030(D)(11)(a)(ii) above.

Applicant has defined, through the cumulative impacts analysis, what the broad types of farm uses are, the number, location, and type of existing dwellings, the dwelling development trends since 1993, and the potential future developments of lot-of-record and/or non-farm dwellings. The range of the study area is south and east of the City of Salem UGB. It encompasses the SA, EFU, and FT zoned parcels south of Ballyntyne Rd S, and north of Cole Rd S. The study area extends east approximately 1.2 miles east of where the UGB intersects Skyline Rd S. The resource zoned parcels in this study area surround a large AR zoned tract adjacent to the subject parcel and south of Skyline Rd S and abut two large AR zoned tracts on the northern and southern edges of the study area.

Within the study area are very few parcels at or above the minimum resource parcel size (80-acres). Those large farm parcels are in use for grass seed, grain and/or Christmas tree production. There are also several Christmas tree farms in the 10 to 60-acre size range. Many of the parcels within the study area are 1 to 10-acres in size and in use for hobby farms and rural residences.

Applicant returned the map with annotations of the locations of class IV – VI soils, as well as an annotated spreadsheet of parcels in the study area. The applicant representative identified 191 parcels in the study area, and screened them for soil quality, dwellings present, contiguity to adjacent owned land containing a dwelling, and removed parcels inadvertently included in the study area. Erroneous parcels included two AR parcels and two parcels in public ownership. Of the 70 vacant parcels, there were 41 in contiguous ownership to a parcel with a dwelling which disqualifies them from lot-of-record criteria 17.137.030D(3). Of the 29 individual vacant parcels, 25 primarily consist of high value soils and had been conveyed later than January 1, 1985 which disqualifies them from being approved for either lot-or-record or non-farm dwellings. Of the four parcels left, three could qualify for a lot of record dwelling based on length of ownership, and the other could qualify for a non-farm dwelling. Marion County Planning agrees that Applicant's analysis is sound.

Applicant concludes that the proposed lot-of-record dwelling will not materially alter the stability of the land use pattern in the area and will not make it more difficult for 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. The pattern of development in this area is primarily small farms and rural residential properties. The development of all possible lot-of-record dwellings and non-farm dwellings would not alter the existing development pattern of the last 30 years, nor make it more difficult for the operation of farms that exist within the study area. The criterion is met.

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

Marion County shall provide this notice. The criterion can be met.

VII. Order

It is hereby found that Applicant has met its burden of proving the applicable standards and criteria for approval of an administrative review application to place a lot of record dwelling on a 4.66-acre parcel in a SA (Special Agriculture) zone located in the 2400 block of Everett Dr S, Salem (T8S; R3W; Section 20B; Tax lot 900). Therefore, the Administrative Review application is APPROVED with the following conditions:

1. The applicant shall obtain all permits required by the Marion County Building Inspection Division.
2. Applicant shall meet the requirements of MCC 17.137 for the SA (Special Agriculture) zone.
3. The County Assessor shall be notified that the county intends to allow the dwelling.
4. Applicant will record a Declaratory Statement acknowledging the subject parcel is within the Sensitive Groundwater Overlay.
5. Applicant will record a Farm/Forest Declaratory Statement acknowledging the need to avoid activities that conflict with nearby farm and forest uses and practices.

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 Str. NE, Suite 2130, Salem, Oregon) by 5:00 p.m. on the 10th day of November, 2022. 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 22nd day of October, 2024.



Jill F. Foster

Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Norman Bickell
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Salem, OR 97317

Area Advisory Committee #1: (via email)
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County Agencies Notified:

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Tax Collector (via email)
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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 2nd day of October 2024 and that the postage thereon was prepaid.



Administrative Assistant to the Hearings
Officer