

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. CU 15-039
Application of:) Clerk's File No.
PATRICK AND JULIE HOCKETT) **Conditional Use**

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Patrick and Julie Hockett for a conditional use to allow agricultural product storage and sales, fertilizer application, and commercial plant trial testing businesses as commercial activities in conjunction with farm use on a 35.59-acre parcel in an EFU (EXCLUSIVE FARM USE) zone at 18651 Westwood Lane NE, Aurora, Marion County, Oregon (T4S, R2W, S25, tax lots 2200, 2300 and 2600).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.119 and 17.136.

III. Public Hearing

A public hearing was held on this matter on November 4, 2015. The Planning Division file was made part of the record. Case file ZC/CP 81-10 was also made a part of the record. The following persons appeared and provided testimony on the application:

1.	Brandon Reich	Planning Division
2.	Tyler Smith	Applicants' attorney
3.	Patrick Hockett	Applicant
4.	Julie Hockett	Applicant
5.	James Haberstich	Opponent
6.	Tracy Haberstich	Opponent
7.	Cindy Gibbons	Opponent
8.	Clarence Stigall	Opponent
9.	Margaret LaFrance	Opponent
10.	Trish Hunley	Opponent

The record remained open until November 12, 2015 for applicants, November 19, 2015 for opponents and November 30, 2015 for applicants. The following documents were entered into the record as exhibits:

Ex. 1	Annotated aerial photograph
Ex. 2	Packet of documents marked 10-20
Ex. 3	181 page packet of documents with annotated stick-on notes
Ex. 4	Packet of documents marked 21-50

- Ex. 5 Unsigned response letter, author unidentified, with attachments marked exhibits 1-14
- Ex. 6 November 30, 2015 reply memorandum from Tyler Smith with addendum 2 and document marked exhibit 51

No objections were raised as to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at hearing. A hearing participant made an objection to Commissioner Brentano acting as decision maker. The hearings officer explained that she is the sole decision maker at this level and the objection was not relevant to the subject hearing.

IV. Findings of Fact

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

1. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The major purpose of this designation and zoning is to promote the continuation of commercial agricultural and forestry operations.
2. The subject property is on Westwood Lane, approximately 1,000 feet northeast of its intersection with Broadacres Road, and immediately west and south of I (INDUSTRIAL) zoned property at 18745 Butteville Road NE.
3. Surrounding uses consist of rural residences and properties being farmed in an EFU zone. Marion Ag Services, Inc. (Marion Ag) operates a fertilizer plant on adjacent I zoned property.
4. The *Soil Survey of Marion County Oregon*, 1972 indicates 100% of the subject property is composed of high-value farm soils.
5. Applicants propose operating an agricultural business storing, wholesaling and applying fertilizer, with an office and plant testing facility as a commercial activity in conjunction with farm use.
6. Background. In 1980, Hassing, et al asked to change the comprehensive plan designation and zoning on a 12-acre portion of a 41.54-acre parcel from farm to industrial, and to divide the property now-described as tax lots 042W02200, 042W02300, 042W02400 and 042W02600 (2200, 2300, 2400 and 2600) into a 12-acre and a 29.54-acre parcel. The 12-acre portion of the property contained two buildings, was heavily rocked and had been used as a sawmill site. The Marion County Board of Commissioners (BOC) gave modified approval to change the zone and comprehensive plan designation on a 6- to 8-acre portion of the site and to divide the 6- to 8-acre portion from the

remaining land, with final configuration to be determined by the Planning Director. The final plat approved a 6-acre parcel and a 35.54-acre parcel. The six acre industrial parcel is now owned by Marion Ag and is the site of a fertilizer prilling plant. The 35.54-acre parcel is the subject of this conditional use application, and includes the 6-acre portion of the sawmill site that was not rezoned and re-designated. Patrick and Julie Hockett built two storage buildings are on this portion of the former sawmill site. The plant testing (office/grow) building is nearby but not on the former sawmill site.

Marion Ag is a Hockett family business, with Hockett family members holding positions of responsibility in the company. The company has several facilities, including the prilling plant on tax lot 2400 and a fertilizer blending facility and retail store in Mount Angel, and has approval for a new fertilizer blending facility on its EFU zoned property just north of the prilling plant. Hockett Farms is another Hockett family entity. Applicant Patrick Hockett runs the Marion Ag prilling plant.

Neighbors contacted the Oregon Department of Environmental Quality (DEQ), starting in about 2007, reporting prilling plant releases of particulate matter into the air and wastewater onto the ground. DEQ recently found the volume of airborne particulate matter from the Marion Ag prilling plant was insufficient to require DEQ permitting, but also found that permitting may be required if production increases to a point where airborne particulate output meets threshold permitting volumes. DEQ found two wastewater releases violated DEQ regulations; one in the processing area of the Marion Ag property and one on the old sawmill site portion of the Hockett property. DEQ issued a mutual agreement and final order assessing monetary civil penalties and requiring Marion Ag to apply for National Pollutant Discharge Elimination System (NPDES) permitting for the prilling plant property and, if land use approval is granted for industrial or commercial use of the Hockett property, to apply for an additional NPDES permit for that property.

Clarification. The Hockett and Marion Ag properties contain a cluster of buildings on and near the old sawmill site. Hearing participants and exhibits often refer to buildings by number, but it is not clear from the record that participants and exhibits use the same numbering system to identify the buildings. Photographs in the record show physical numbering on some buildings, and a DEQ aerial photograph from Marion County Code Enforcement's submission shows a somewhat different numbering and identification system. Applicants submitted an aerial photograph during the open record period in an attempt to set one method of identifying the buildings. For purposes this

order, the hearings officer accepts and uses applicants' building identification and numbering system as shown in the following annotated aerial photograph from Exhibit 4.

Google Maps

Numbering as used by Applicants from now on



Exhibit 50

Imagery ©2015 Google, Map data ©2015 Google 100 ft

<https://www.google.com/maps/@45.1904883,-122.8690921,332m/data=!3m1!1e3>

11/12/2015

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

The Marion County Department of Public Works (MCDPW) Land Development and Engineering Permits Section (LDEP) commented:

Approval of the proposed Conditional Use would allow storage of agricultural products within existing storage buildings as a commercial activity in conjunction with farm use on a 35.59-acre parcel located within an EFU (Exclusive Farm Use) zone. Public Works Engineering Division condition and requirements are given below.

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Engineering Condition:

Public Works Engineering requests that the following condition lettered A is included in the approval of the land use case.

Condition A - Within ninety (90) calendar days from the date of an approved Notice of Decision, remit payment for transportation System Development Charges (SDCs) for the monetary net difference between the Manufacturing rate for the Change-In-Use and previously assessed Hay Storage rates for two 12,500 square-foot storage buildings situated on tax lot 2300, associated with Building Inspection Permit #09-06527 and #11-05806.

Financial responsibility for payment of SDCs is governed under Marion County Ordinance #00-10R, and typically is given as an Engineering Requirement, but is being elevated to a Condition status relative to timing for satisfaction relative to date of case approval. Nexus for reassessment is the proposed Change-In-Use from pure agriculturally related activity to commercial use in providing storage capacity to support the Industrial manufacturing of fertilizer products taking place on tax lot 2400 within an Industrial (I) zone, which will result in an anticipated increase in generated traffic on county roads. As an example and for comparison purpose, Building Permit #14-004963 issued in 2014 for a 12,500 square foot storage building sited on tax lot 2300 was assessed \$9,768 under the Manufacturing rate since it became disclosed at the time that the building was intended to support the long established fertilizer production. The two storage buildings eligible for SDC reassessment were built in 2009 and 2011, respectively. At Marion County, SDCs are typically assessed in conjunction with intake of building permit fees; as such, Marion County does not have an invoicing process for the Change-In-Use assessment. Therefore, it is incumbent upon the Applicant to coordinate with MCPW Land Development Engineering & Permits regarding payment. Failure to comply with the above Condition will hinder issuance of certain future building permits, make the properties ineligible for land use approvals, and potentially rise to the level of Code Enforceability.

Engineering Requirements

The following requirements lettered B and C, are informational only regarding County requirements and issues that the applicant must address if the proposal is approved and the proposed use established. They will only be generally referenced in the forthcoming Planning Division *Notice of Decision*.

- B. Westwood Lane is a graveled Local Access Road within a 40-foot wide public right of-way, but is not maintained by Marion County per state statute. By default then, adjacent users of Local Access Roads are collectively responsible

for maintenance. Potential addition of regular truck traffic to Westwood Lane would cause added wear and tear to the gravel surface, thereby necessitating increased maintenance. Although the Marion Ag Service business office located at #18561 Westwood Lane is served by the Lane, the manufacturing side of the business can also be accessed from the Marion Ag Service #18745 Butteville Road driveway, and the #9400 St. Paul Hwy driveway put in under Access Permit #555-15-001818, both of which are paved. The Applicant shall direct truck deliveries of raw materials and export of finished products to either of those Butteville Road or St. Paul Hwy driveways, and not Westwood Lane.

- C. The subject property is within the unincorporated area of Marion County and will be assessed Transportation System Development Charges (SDCs) upon future application for building permits or Change-In-Use, per Marion County Ordinance #00-10R."

Marion County Building Inspection commented that a building permit may be required for a change of occupancy.

Marion County Code Enforcement (MCCE) commented that there are problems with the property and provided the following:

This is the history and narrative of Marion County Code Enforcement Case File C15-0151. This case involves three adjoining properties one identified as 18651 Westwood Lane NE, the next by map and tax lot No. 042W2502300 and the third as the Marion Ag Prilling Plant addressed as 18745 Butteville Rd NE, Aurora. The Marion County Assessor lists the property owners for 18651 Westwood Lane NE (19.77 Acres) and map and tax lot No. 042W2502300 (6.05 Acres) as Patrick and Julia Hockett. The properties are zoned as Exclusive Farm Use (EFU) and are located adjacent to the Marion Ag Services Inc Prilling Plant at 18745 Butteville Rd NE, Aurora which is zoned Industrial. Research confirmed that Patrick Hockett, owner of the two EFU properties, is the son of Robert Hockett, Owner and President of Marion Ag. Services Inc. Patrick Hockett is also the Plant Manager for the Marion Ag Prilling Plant and has been with this company since 1980.

MCCE received a complaint in February of 2015 reporting that three buildings, located on properties owned by Patrick and Julia Hockett, were being used by and for the adjoining industrial operation at the Marion Ag Prilling Plant. An inspection was completed of the Marion Ag Prilling Plant by the Department of Environmental Quality (DEQ) on February 13, 2015. (See Document Exhibit 1) As part of the Code Enforcement

investigation an information request was submitted to DEQ. The inspection report confirmed what the Code Enforcement's complainant alleged as the report outlined Marion Ag's use of the three buildings (belonging to Patrick and Julia Hockett) as part of their industrial operation. The report included a map which identified Building (b) as the Marion Ag office and shop and Buildings (3) and (4) as two Marion Ag storage facilities with no electricity. (See Document Exhibit 2)

According to the Ag-Exempt applications, submitted by Patrick and Julia Hockett, all three buildings were to be used in the following ways: Building (b) was built as an office/shop (See Document Exhibit 3); Building (3) was built for the purpose of grass and wheat storage (See Document Exhibit 4); and Building (4) was built for the purpose of farm storage (See Document Exhibit 5). None of the applications for the three buildings mentioned any affiliation or use for or by Marion Ag. Declaratory statements are required for all structures built as Ag-Exempt; the declaratory document is recorded with the deed by the Marion County Clerk. In this case there are declaratory statements for buildings (3) and (4); however, a declaratory statement could not be located for building (b). (See Document Exhibits 6 and 7) All three buildings were constructed *without structural permits* as agriculturally exempt and have limitations associated with their use. Agriculturally exempt refers to the fact that the building is only used for the purposes of a farm operation e.g. storage of hay, feed, tack, tractors, animal stabling or feeding and exempt refers to the fact that these buildings are exempt from structural permits. The uses allowed are listed in Oregon Revised Statute (ORS) 455.315.

MCCE sent an enforcement letter to the property owners Patrick and Julia Hockett regarding the reported violations located on their EFU properties on March 9, 2015. (See Document Exhibit 8) This letter outlined the reported violations; demanded the cessation of the violation and requested an onsite inspection to confirm the violations had ended. Attorney Tyler Smith responded to that correspondence on March 19, 2015. (See Document Exhibit 9) A response letter was sent to Attorney Smith and copied to Mr. Hockett on April 28, 2015. (See Document Exhibit 10) This letter again demanded the cessation of the reported violation and requested the onsite inspection. Further, because there was no response to MCCE regarding the April 28, 2015 enforcement letter a final letter went out to Attorney Smith and was copied to the Hockett's seeking compliance. (See Document Exhibit 11)

Conditional Use Permit CU15-039 application was submitted for Patrick and Julia Hockett by their Attorney, Tyler Smith, on September 3, 2015. The application addresses conditional uses for buildings (3) and (4) but does not address building (b).

According to the application for Conditional Use CU15-039 the property owners are requesting to store agricultural products inside existing storage buildings (3) and (4). A memorandum from Mr. and Mrs. Hockett's attorney, Tyler Smith, found in the Conditional Use Application Packet, states that the conditional use application is being filed for the sole purpose of obtaining express permission under the law for the owners, or even their lessees if and when leased (such as to Hockett Farms), to store farm products, agricultural products, farm machinery, farm equipment inside the existing building and otherwise assist in their farm operation of raising, harvesting, selling, storing, fertilizing and servicing their fields and crops in the Marion County area. Some of the listed uses could be defined as commercial/industrial uses conducted in conjunction with Farm Use; however, none are directly referenced to the Marion Ag Operation instead the references are notably generic and would not necessarily clear the violations listed in MCCE C15-0151.

In a telephonic conversation with Attorney Smith around the end of September 2015 there was discussion about the required inspection of building (b). Because building (b) was not included in Conditional Use Permit Application for CU15-039 and is reported to be used in the Administrative operation for Marion Ag an inspection of the building is required to determine if the building is compliant with current ag-exempt allowances. Attorney Smith stated that the request would be discussed with his clients. To date the necessary inspection has not been further discussed, scheduled or completed.

On July 20, 2015, Marion Ag c/o Robert Hockett received a Notice of Civil Penalty Assessment and Order from the Department of Environmental Quality (DEQ). (See Document Exhibit 12) A civil penalty of \$27,133.00 was levied on Marion Ag for water quality violations found at the facility located 18745 Butteville Road NE, Aurora. According to the enforcement letter dated July 20, 2015 to Marion Ag from DEQ the fine was issued because in October of 2014 and again in February 2015 waste from the facility's manufacturing process was observed in location where some waste was either discharging to or had the potential to discharge to, ditches that discharge to Ryan Creek. The waste contained industrial pollutants that could damage aquatic species and their habitat and reduce the safety and usability of waterways.

The Order attached to the July 20, 2015 states under Findings of Fact(4): *The Facility is engaged in industrial activity with the primary Standard Industrial classification (SIC) code of 2875 identified in "Table 1: Sources Covered" in the NPDES 1200-Z General Permit. The order goes on to say: on or about October 24, 2014, DEQ staff conducted an inspection of the*

Marion Ag facility and observed lignin-based solids, liquid limestone, dolomite and gypsum in an uncovered and uncontained pile on a parcel of property adjacent to the Facility. The result of which left puddles of blackish-brown liquid on the ground around the pile and black liquid runoff discharging from the pile to a ditch that discharges to Ryan Creek. The October 24, 2014 inspection confirmed that liquid process wastewater was pooled on the ground surface around the dispensing area at the Facility and the dispensing area is located near a drain tile. Also, at the same time in 2014 Marion Ag was conducting truck washing in the northwest corner of the Facility, resulting in wastewater discharging to a ditch that discharges to Ryan Creek.

The notice goes on to outline the findings from the February 4, 2015 inspection as follows: staff observed liquid process wastewater pooled on the ground surface around the dispensing area at the Facility and the dispensing area is located near a drain tile. Additionally, both on October 24, 2014 and the February 4, 2015 inspections, Marion Ag violated ORS 468B.025 (1)(a) by placing wastes in a location where such wastes are likely to escape or be carried into waters of the state. In both of these instances the waste was placed on the private farm property owned by Patrick Hockett, tax lot 042W2502300. Somewhere near the two ag-exempt buildings, identified in Document Exhibit 2 as buildings (3) and (4), listed in the Conditional Use Application for CU15-039.

The DEQ order also states in Section 111 Conclusions (2) since October 2009 Marion Ag has violated ORS 468B.050(1)(d) and OAR 340-045-0033(6) by operating a discharge source or conducting an activity described in a general storm water permit without first applying for the required Storm Water Permit. A Storm Water Permit is now required for the Marion Ag Prilling Plant which according to DEQ will include the properties belonging to Patrick and Julia Hockett as they recognize in their findings that Buildings (b), (3) and (4) are part of the Marion Ag Prilling Plant operation.

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

V. Additional Findings of Fact and Conclusions of Law

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

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when

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

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 equally likely or less likely, applicants have not met their burden and the application must be denied. If the evidence for every criterion is a hair or breath in applicants' favor, then the burden of proof is met and the application will be approved.

MCC 17.119

2. Under MCC 17.119.100, the Planning Director may forward a conditional use application to the hearings officer for initial decision. The Planning Director forwarded the conditional use application to the hearings officer for initial decision. The hearings officer may hear and decide this matter.

3. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of property subject to an application. A quitclaim deed from Pursley to Hockett and Hocket (sic) purports transfer of property accounts R12217 and R12218 (tax lots 2300 and 2200), and if correct, would transfer no interest in tax lot 2600, the office/grow building site, to the Hocketts. The deed also references an attached exhibit one. The exhibit's metes and bounds property description includes tax lot 2400 (the I zoned Marion Ag property) and 2600 along with tax lots 2200 and 2300. Neither 2400 nor 2600 is listed on the face of the deed. The save and except portion of the deed describes excepted property as a "tract" that is part of the Gideon Senecal Donation Land Claim (DLC) partially in sections 25 and 30. Tract implies the excepted property could be made up of one or more properties, and without more is not conclusive as to what property is excepted. The save and except portion of the property description states the tract is "more particularly described as follows" but nothing follows.

File ZC/CP 81-10 contains a then current Assessor's map showing F & J Hassing owned what are now tax lots 2200, 2300 and 2600, and D.L. and L.M. Hassing owned what is now tax lot 2400, even though the property was determined to be one parcel. The partitioning plat in the file shows what is now tax lot 2400 was divided from what are now tax lots 2200, 2300 and 2600, leaving both as separate parcels. The plat describes parcel 2, the

current I zoned parcel similarly to the save and except portion of the Pursley to Hockett and Hocket quitclaim deed, but with a more particular legal description of tax lot intact. It is more likely than not that the quitclaim deed saves and excepts tax lot 2400 from transfer, but it is still not clear whether the quitclaim deed conveyed what is now tax lot 2600. Other deeds not in the record may clarify tax lot 2600's transfer. To ensure a complete application and record, a condition of any approval will require applicants to provide sufficient proof of tax lot 2600 ownership. With this condition of approval, MCC 17.119.020 will be satisfied.

4. Under MCC 17.119.025 a conditional use application shall include signatures of certain people, including the property owner. As noted above, the document submitted to the record to show ownership of the subject property is insufficient as to tax lot 2600, and to ensure a complete application, a condition of any approval will require applicants to provide sufficient proof of tax lot 2600 ownership. With this condition of approval, MCC 17.119.025 will be satisfied.
5. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:
 - (A) That the hearings officer has the power to grant the conditional use;
 - (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
 - (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
6. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in the MCC. MCC 17.136.050(D)(2) lists commercial activities in conjunction with farm use, subject to MCC 17.136.060(D) as a conditional use in the EFU zone. The hearings officer may hear and decide this matter. MCC 17.119.070(A) is met.
7. Under MCC 17.136.010, the purpose of the EFU zone is to provide areas for continued practice of commercial agriculture. It is intended to be applied in areas composed of predominantly high-value farm soils generally well suited to large-scale farming. The EFU zone is also applied to small inclusions of tracts composed predominantly of non-high-value farm soils to avoid potential conflicts between commercial farming and non-farm uses

allowed on non-high-value farmland. To provide needed protection within cohesive areas it is sometimes necessary to include incidental land unsuitable for farming and some pre-existing residential acreage.

To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.

To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-33-130 and in some cases more restrictive criteria to ensure adverse impacts are not created.

Non-farm dwellings generally create conflicts with accepted agricultural practices. Therefore, the EFU zone does not include lot of record non-farm dwelling provisions. Provisions limiting non-farm dwellings to existing parcels composed of Class IV - VIII soils are included because the criteria adequately limit applications to a very few parcels and allow case-by-case review to determine whether the proposed dwelling will have adverse impacts. The EFU zone is intended to be a farm zone consistent with OAR 660, Division 033 and ORS 215.283.

As stated in MCC 17.119.010, a conditional use is an activity similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. MCC 17.136.060 provisions are intended to look at individual conditional uses and ensure they conform to the purpose and intent of the zone. If MCC 17.136.060 criteria are met, the proposed use will be in harmony with the purpose and intent of the zone. Applicable criteria are discussed below and are met or will be met with conditions. MCC 17.119.070(B) is met.

8. Conditions imposed below ensure criteria are met and are 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. MCC 17.119.070(C) is satisfied.
9. Scope of application. The Planning Director found the subject property was being used for several activities, including storing Hockett Farm's and Patrick and Julie Hockett's farming equipment and materials; storing Patrick and Julie Hockett's

grass seed; storing fertilizer products from Marion Ag; storing fertilizer for application on Hockett owned farm land; applying fertilizer on other farmer's land; wholesaling fertilizer and similar Marion Ag products; a farm office for the Hockett farm operation; plant testing for Hockett farms; and plant testing for other farm operations. The Planning Director found and the hearings officer concurs that that some of these activities are not allowed outright on EFU zoned land.

Two warehouse buildings on tax lot 2300 are used to store and wholesale Marion Ag product. The office/grow building on tax lot 2600 is used for the trial testing plants for other than applicants' farm operations. A fertilizer application business for other than applicants' farmland is also run out of the property. The hearings officer finds these activities require conditional use approval to continue on the property.

10. A question arose at hearing concerning Marion Ag's use of the subject property and whether it amounts to improper *de facto* expansion of the Marion Ag operation onto the subject property.

Neighbors contend Marion Ag uses the office/grow building for its offices. The Hocketts and Marion Ag are intertwined to some extent and may share resources, but the Marion Ag office is not proven on this record and is not a subject of this application.

Marion Ag's prilling plant product is stored on, and sold and shipped from the subject property. Applicant Patrick Hockett runs the Marion Ag prilling plant. Marion Ag and Hockett buildings are clustered in the same area, have an interconnected vehicular circulation system, Marion Ag workers move Marion Ag product to and from the subject property, and increasing Marion Ag's storage capacity will allow increased operational flexibility. Given all of this, it is hard not to view this request as an expansion of prilling plant operations, but that does not mean the requested uses are not allowed in the EFU zone. CU 14-022 approved a Marion Ag fertilizer plant as a commercial activity in conjunction with farm use on EFU zoned land, and that use included fertilizer storage, wholesaling and transportation. The hearings officer sees nothing in the MCC that prevents applicants from seeking land use approval even if the product being stored, wholesaled and transported comes from off-site.

MCC 17.136.060 (D)

11. MCC 17.136.060(D) provides specific criteria for approval of a commercial activity in conjunction with farm use:

- (1) The commercial activity must be primarily a customer or supplier of farm uses.
 - (2) The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.
 - (3) The agricultural and commercial activities must occur together in the local community to satisfy the statute.
 - (4) The products and services provided must be essential to the practice of agriculture.
12. Fertilizer application is a customary farm practice. Trial testing various fertilizer applications on plant growth is a service provided to farm customers. Providing wholesale fertilizers supports farm use. The proposed commercial activities are primarily a supplier of farm uses. MCC 17.136.060(D)(1) is met.
13. Most products and services are sold to Marion County area farms. Fertilizer application replenishes farm soils, allowing better plant growth and development. Trial testing fertilizers on plants allows farmers to make more knowledgeable decisions about possible farm practices. Providing wholesale fertilizers from a local source with lower transportation costs supports a more cost-effective farm enterprise. The proposed commercial activities enhance farm enterprises in the local agricultural community. MCC 17.136.060(D)(2) is met.
14. Most Marion Ag products are sold to Marion County area farms, so the products stored, sold and transported from the subject property would primarily go to local farm operations. Fertilizer application for other than the Hocketts would occur in the same general area as the fertilizer sales, and plant testing is conducted on site at the request of farmers in the local area. The agricultural and commercial activities occur together in the local community. MCC 17.136.060(D)(3) is met.
15. Fertilizing crops is a longstanding agricultural practice. Applying and supplying fertilizers are essential to continuing agricultural practice. Trial testing agricultural products on plants is a common practice to help maximize farm production. The proposed products and services are essential to the practice of agriculture. MCC 17.136.060(D)(4) is met.

MCC 17.136.060(A)

16. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:

1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
 2. Adequate fire protection and other rural services are or will be available when the use is established.
 3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
17. *Farm practices.* MCC 17.136.060(A)(1) incorporates ORS 215.196(1) farm and forest practice requirements. ORS 215.196(1) as interpreted in *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), requires a three-part analysis to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

To identify farm uses on surrounding lands devoted to farm or forest use, applicant looked at properties adjacent to and near the subject property, including lands in the farm zone notification area. The hearings officer finds the appropriate area for examining effects on farm and forest operations is the land use notification area. This area is the presumed sphere of influence for farm zone uses and contains the farming operations most likely to be affected by the proposed conditional use.

The surrounding area contains no forest operations. Forest practices are not examined. Grass seed, the predominant farm crop in the area, requires working and packing the ground to appropriate firmness for spreading or drilling seed. Weed control can be handled by mechanical or herbicidal methods. Pesticides and fertilizers may be applied if needed. At harvest, fields are combined, or swathed and then combined. Seeds are cleaned, dried, stored and delivered to market. Fields can be burned to help control pests and rid fields of post harvest residue. Perennial grass seed varieties do not require annual seedbed reestablishment.

Vegetable, grain, hay and other crops require similar cycles of plowing, planting, fertilizing, weed control harvesting, transport and clean up. Livestock require containment, pasturing and/or supplemental feeding and transportation to market.

Practically speaking, applicants' and Marion Ag's properties are the only lands in farm use in the notification area, and they provide a significant buffer from other farm uses on all sides. Railroad and roadway rights-of-way and residential uses provide additional separation from farmland. The proposed uses are fairly benign as related to farm uses in this area. It is more likely than not that the proposed uses will not cause significant change in, or increase in the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. MCC 17.136.060(A)(1) is met.

18. *Adequate services.* Utility lines are available to the subject property though buildings 3 and 4 have and need no electricity or water service. The office building has water, septic and electric service. An evaluation of the septic system would likely be required for the change of occupancy to a commercial use. With a condition requiring Building Inspection Division permitting, wastewater will be handled appropriately on site. Vehicular access to the office/grow building appears to be from Westwood Lane, a non-county maintained road. Applicants shall be responsible for shared maintenance of Westwood Lane. Storage buildings 3 and 4 can be reached from Westwood Lane, but DPW LDEP would restrict traffic to and from the storage buildings to Marion Ag's Butteville and St. Paul Highway entrances only. It makes sense to keep the traffic burden for product transport off the non-county maintained road and use access points already designed for truck traffic. A Woodburn Rural Fire Protection District (WRFPD) substation is across Butteville Road from the subject property. Applicants will need to provide proof from WRFPD that its requirements have been met or are not applicable.

With conditions of any approval requiring shared maintenance of Westwood Lane, restricting storage building traffic to

Marion Ag's Butteville and St. Paul Highway entrances, proof of Building Inspection permitting approval for change in occupancy for all buildings and proof of WFRPD compliance, adequate fire protection, roadway and other rural services are or will be available when the use is established. As conditioned, MCC 17.136.060(A)(2) will be met.

19. *Significant adverse impact.* Neighbors are particularly concerned about air and water quality issues involving Marion Ag's prilling plant operation. DEQ recently found the volume of airborne particulate matter from the Marion Ag prilling plant was insufficient to require DEQ permitting, but also found that permitting may be required if production increases to a point where airborne particulate output meets threshold permitting volumes. DEQ found wastewater release from washing trucks on this subject property violated DEQ regulations. DEQ issued a mutual agreement and final order assessing monetary civil penalties and requiring NPDES permitting for the subject property if land use approval is granted for its industrial or commercial use. Permit application will be required as a condition of any approval. Neighbors also allege fertilizer manufacturing is taking place in one of applicants' storage building. Applicant denies the practice is occurring and provided interior photographs of both storage buildings. A condition of any approval will forbid fertilizer manufacturing or blending on the subject property without land use review. Wastewater disposal associated with plant trial testing can be reviewed as part of the Building Inspection Department permitting process required as a condition of any approval. Ryan Creek runs through the subject property but is not a listed MCCP sensitive waterway. The subject property is not within an identified floodplain, geologic hazard, big game habitat, watershed or sensitive groundwater overlay area. As conditioned, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality, and MCC 17.136.060(A)(3) will be met.
20. *Noise.* Noise sensitive residential uses are near the subject site. Marion County's noise ordinance, MCC chapter 8.45, at 8.45.080(A) specifically exempts sounds generated by conditional use permit activities from prosecution if the activities are conducted in accordance with the terms and conditions of the permit. Conditional uses do not get a free pass on noise, but the noise standards must be set in the conditional use permitting process to be enforced. The hearings officer often looks to DEQ noise regulations at OAR 340-035 for guidance in setting conditional use case standards, and keeps in mind its practice of not allowing significant increases in noise from new commercial uses. Here, the office/grow building use is quite

passive, but its exhaust system can be a noise source. But, the exhaust system is already in use for applicants' personal trial testing activities, and adding commercial trial testing for farm customers is unlikely to significantly increase overall noise.

The fertilizer application business will increase truck noise somewhat but the actual application will take place off-site. Storage is a relatively passive use, but getting the product to and from the storage buildings will require forklift and truck use. Noise will include back up beeper, engine and tire noise. Applicants point out that truck traffic and loading and unloading operations already exist on the neighboring Marion Ag property and farming machinery and vehicle noise also exists at the site and in the area. Storage and transport of wholesale amounts of product will generate additional noise but there appears to be at least some vegetative buffer between the storage buildings and EFU zoned properties in residential use. Nearest residences are about 400' south of the storage buildings. Residences to the west are over a thousand feet away. Overall, the addition of applicants' estimated eight to ten additional trucks per day will, more likely than not, have no significant adverse impact on nearby land uses. MCC 17.136.060(A)(4) is satisfied.

21. *Water impounds/mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is satisfied.

VI. Order

It is hereby found that applicants have met the burden of proving applicable standards and criteria for approval of a conditional use application to store and wholesale agricultural products, to provide fertilizer application services, and provide plant trial testing services as commercial activities in conjunction with farm use on a 35.59-acre parcel in an EFU (EXCLUSIVE FARM USE) zone have been met. Therefore, the conditional use application is **GRANTED**, subject to the conditions set forth below. These conditions are necessary for the public health, safety and welfare.

1. No fertilizer manufacturing or blending is allowed on site without further land use review.
2. Within 30 days of the effective date of this order, applicants to provide sufficient proof of tax lot 2600 ownership.
3. Applicants shall be responsible for shared maintenance of Westwood Lane.

4. Access to storage buildings 3 and 4 is restricted to Marion Ag's Butteville and St. Paul Highway entrances only.
5. Within 90 days of approval, applicants shall remit payment for transportation System Development Charges for the monetary net difference between the Manufacturing rate for the Change-In-Use and previously assessed Hay Storage rates for two 12,500 square-foot storage buildings situated on tax lot 2300, associated with Building Inspection Permit #09-06527 and #11-05806.
6. Within 60 days of the effective date of this order, applicants shall obtain all permits required by the Marion County Building Inspection Division.
7. Within 60 days of the effective date of this order, applicants shall record an Agricultural Exempt Declaratory Statement for the office on tax lot 2600.
8. Within 60 days of the effective date of this order, applicants shall record a Farm/Forest Declaratory Statement for the subject properties.
9. Within 90 days of the effective date of this order, applicants shall provide evidence from DEQ, satisfactory to the Marion County Planning Director, that all required permits from Oregon Department of Environmental Quality, including NPDES permits, have been obtained, are in the process of being obtained, or are not required.
10. Within 60 days of the effective date of this order, applicants shall provide proof from the Woodburn Fire District that District Building Access, Water Supply, and Premise Identification regulations are met.
11. Applicants shall obtain all required access permits from the Oregon Department of Transportation (ODOT) for use of the St. Paul Highway access.
12. Development shall significantly conform to the site plan submitted with the proposal. Minor variations are permitted upon review and approval of the Planning Director.
13. Failure to continuously comply with the conditions of approval may result in this approval being revoked. Any revocation may be appealed to the county hearings officer for a public hearing.

VII. Other Permits

The applicant herein is advised that the use of the property proposed in this application may require additional permits from

other local, state or federal agencies. The Marion County land use review and approval process does not take the place of, or relieve the applicant of responsibility for, acquiring such other permits, or satisfy any restrictions or conditions thereon. The land use permit approved herein does not remove, alter or impair in any way any covenants or restrictions imposed on this property by deed or other instrument.

VIII. Effective Date

The application approved herein shall become effective on the 15th day of March 2016, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

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) by 5:00 p.m. on the 14th day of March 2016. 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 26th day of February 2016.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Patrick & Julie Hockett
18004 Arbor Grove Rd. NE
Woodburn, OR 97071

Tyler Smith
181 N. Grant St., Ste. 212
Canby, OR 97013

Woodburn Fire District
1776 Newberg Hwy.
Woodburn, OR 97071

Tom Wimmer
438 Troon Dr.
Woodburn, OR 97071

Trish Hunley
9513 Broadacres Rd. NE
Hubbard, OR 97032

Scott Campbell
5876 Windy Ridge Dr. SE
Salem, OR 97317

Linda Stigall
9243 Broadacres Rd. NE
Aurora, OR 97002

Agencies Notified
Planning Division (via email)
Building Inspection (via email)
Public Works Engineering (via email)
Code Enforcement (via email)
AAC Member No. 6

John Singer
21875 Butteville Rd. NE
Aurora, OR 97002

James & Tracy Haberstich
9293 Broadacres Rd. NE
Aurora, OR 97002

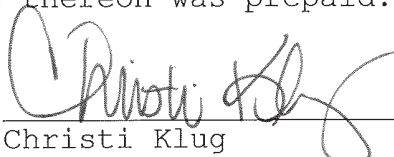
Cindy Gibbons
9163 NE Broadacres Rd.
Aurora, OR 97002

Clarence Stigall
9243 Broadacres Rd. NE
Aurora, OR 97002

Margaret LaFrance
18626 Butteville Rd. NE
Aurora, OR 97002

Department of Environmental Quality
Office of the Director
811 SW Sixth Ave.
Portland, OR 97204-1390

by mailing to them copies thereof, except as specified above for agency notifications. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited in the United States Mail at Salem, Oregon, on the 26th day of February 2016, and that the postage thereon was prepaid.



Christi Klug
Secretary to Hearings Officer