BEFORE THE CROOK COUNTY COURT

IN THE MATTER OF THE APPEAL OF 217-19-000987-PLNG
FOR CONDITIONAL USE APPROVAL OF A COMMERCIAL USE
IN CONJUNCTION WITH FARM USE
(EFU-3, Powell Butte Area)

DATE:	March 6, 2020
OWNER(S):	Stanley Shephard 23050 NE Boones Ferry Road Aurora, Oregon 97702
APPLICANT:	Central Oregon Processing LLC (successor to Evergreen State Holdings LLC) 212 North Street Grass Valley, Oregon 97029
AGENT (ATTORNEY):	Tami MacLeod Lynch Conger LLP 1000 Disk Drive Bend, Oregon 97702
APPELLANTS:	As listed on the appeal form submitted February 7, 2020.
APPELLANTS ATTORNEY:	Lisa Andrach Bryant Emerson LLP 888 SW Evergreen Avenue Redmond, Oregon 97756
LOCATION:	14S 14E Tax Lot 1400 11311 SW Cornett Loop Powell Butte OR 97753
APPEAL HEARING:	March 13, 2020
APPROVAL CRITERIA:	CCC 18.16 (Farm Use) Crook County Code 18.160 (Conditional Uses)
PROCEDURE:	CCC 18.172 (Administrative Provisions)
EXHIBITS:	Exhibit A, Planning Commission's Conditions of Approval Exhibit B, *Heibenthal v. Polk County,* LUBA No. 2003-082 (2003)

I. BACKGROUND

PROCEDURAL HISTORY:

LOCATION: The subject property is located north of Cornett Loop at 11311 and 11329 SW Cornett Loop in Powell Butte. The existing tax lot measures 160.71 acres in size. It is approximately 5.2 miles northwest of the Prineville Airport and 4.5 miles north of the Powell Butte Charter School.

ZONING: The property is zoned Exclusive Farm Use - 3, Powell Butte area (CCC 18.16). This property is designated Agricultural in the Crook County Comprehensive Plan.

SITE DESCRIPTION: The property was partitioned in 2013 (LP13-152) into a 160+/- acre parcel with two existing dwellings and multiple agricultural structures, including an 89,250 sq. ft. arena. The structures on the property are permitted as Equine Exempt and will need to submit change of use applications when they are no longer being utilized for equines. The subject parcel is part of a larger agricultural tract including 915 acres under the same ownership where industrial hemp is being grown. In 2017, a site plan modification was approved for an industrial hemp processing facility to be located inside the barn/arena (217-17-000449-PLNG).

SURROUNDING LAND USES: The surrounding properties are all zoned Exclusive Farm Use Zone (EFU-3 Powell Butte Area). The parcels range in size from 10 acres to 480 acres and are a mix of non-farm residential and farm parcels, some of which are in active farm use.

REQUEST: The Applicant's request is for a "Commercial Use in Conjunction with Farm Use" by placing and operating an outdoor industrial hemp extraction processing facility on the subject property. An existing exempt structure is proposed to be enlarged as shown on the applicant's tentative plan to include 17,000 square feet for the processing area. The Applicant is requesting approval for a closed loop commercial outdoor processing facility to be located under an existing exempt canopy structure, for extraction of industrial hemp oil in conjunction with farm use for industrial hemp (entirely non-cannabis), which they state will be the only crop processed in this outdoor processing facility.

SEPTIC: There is an existing septic system on the subject property that is sized to serve restrooms in the arena and a bunkhouse with up to 6 bedrooms.

DOMESTIC WATER: Three domestic wells serve the subject property.

WATER RIGHTS: There are existing water rights on the property. The applicant must receive approval of the Central Oregon Irrigation District for any change in water rights specific to this approval.

FIRE PROTECTION: The parcel is in the Crook County Fire Protection District. (See Attachment C, Crook County Fire Department Comments)

II. HEARING PROCEDURE:

CCC 18.172, Administrative Provisions

CCC 18.172.110, Appeal

(12) Scope and Standard of Review of Appeal.

(a) On the Record Review. The appeal is not a new hearing, it is a review of the decision below. Subject to the exception in subsection (12)(a)(vi) of this section, the review of the final decision shall be confined to the record of the proceedings below, which shall include, if applicable:

(i) All materials, pleadings, memoranda, stipulations and motions submitted by any party to the proceeding and received by the planning commission as evidence.

(ii) All materials submitted by Crook County staff with respect to the application.

(iii) The transcript of the relevant portions of the planning commission hearing.

(iv) The written final decision of the planning commission and the petition of appeal.

(v) Argument (without introduction of new or additional evidence) by the applicant, appellants or their legal representative.

(vi) The appellate body may, at its option, admit additional testimony and other evidence from an interested party or party of record to supplement the record of prior proceedings. The record may be supplemented by order of the appellate body or upon written motion by a party. The written motion shall set forth with particularity the basis for such request and the nature of the evidence sought to be introduced. Prior to supplementing the record, the appellate body shall provide an opportunity for all parties to be heard on the matter. The appellate body may grant the motion upon a finding that the supplement is necessary to take into consideration the inconvenience of locating the evidence at the time of initial hearing, with such inconvenience not being the result of negligence or dilatory act by the moving party.

(b) Standard of Review on Appeal. The burden of proof in a hearing shall be as allocated by applicable law. The burden shall remain with the applicant to show that relevant criteria were met for an application throughout the local appeal process. For an appeal on the record, an appellant shall have the burden to articulate reasons why the initial decision is in error.

The above code section is cited to inform interested parties regarding the procedure that will apply at the hearing. Importantly, additional procedural rules may apply to the appeal and the decision. Those rules can be found online at https://www.codepublishing.com/OR/CrookCounty/

Pursuant to CCC 18.172.110(10)(a), on February 19, 2020, the Crook County Court ("Court") held a public hearing and determined the appellants' appeal was properly filed.

III. APPEAL

As of the writing of this Staff Report, since the Planning Commission's Decision ("Decision") was issued, no comments from the applicant or public have been received, except for the appellants' appeal. Accordingly, this staff report addresses the Decision and the appeal document submitted by the appellants.

1. Notice – Prejudice

The appellants contend that the County's notice of the application, decision, and appeal are inadequate because the County only provided notice to property owners within the required distance from the subject property (Tax Lot 1400); not the whole 915 acre tract. Staff understand this argument to be that if the entire tract were treated as the subject property, additional parties would have been entitled to notice. The appellants believe the entire tract needed to be treated as the "subject property" because the Decision includes a description of the subject property that notes that it is a "part of a larger agricultural property including 915 acres" and the Decision includes findings that "incorporate into the analysis of the applicable approval criteria the owner's neighboring parcels."

The County was required to provide notice of the hearing in accordance with CCC 18.172.070 and ORS 197.763(2). Importantly, ORS 197.763(2) requires:

> ***(2)(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:***
>
> > ***(A)Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;***
> >
> > ***(B)Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or***
> >
> > ***(C)Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone.***
>
> ***(b)Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.***
>
> ***(c)At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.***

In *Mackenzie v. City of Portland*, LUBA No. 2014-089, the Land Use Board of Appeals ("LUBA") interpreted the meaning of "subject property" and found:

> "'property which is the subject of the notice for purposes of ORS 197.763(2)(a) includes a minimum of the lots or parcels that the applicant owns or controls and on which development is proposed, plus any additional off-site areas to be developed, if the applicant acquires the property or similar interest in the off-site development."

Here, the County sent notice to neighboring property owners within 750' of Tax Lot 1400. As the Site Plan (Amended Staff Report, Attachment A) depicts, the proposed use is only being developed on Tax Lot 1400. Additionally, the remainder of the tract is not owned by the applicant; the owner of the entire tract is Stanley Shephard, but he is not the applicant. Thus, in light of *Mackenzie,* Staff believe the notice is sufficient.

Alternatively, even if the notice were defective for the reasons stated in the appeal, since the appellants participated in the local process and appealed the decision, it is unclear how they have been substantially prejudiced.

2. Findings and Decision

The appellants raise a number of issues challenging the findings in the Decision. This Staff Report will try to address those issues in a manner that correlates roughly with the order criteria were analyzed in the Decision.

CCC 18.16.015, Use Standards

> ***(1) A farm on which a processing facility is located must provide at least one-quarter of the farm crops processed at the facility. A farm may also be used for an establishment for the slaughter, processing or selling of poultry or poultry products pursuant to ORS 603.038. If a building is established or used for the processing facility or establishment, the farm operator may not devote more than 10,000 square feet of floor area to the processing facility or establishment, exclusive of the floor area designated for preparation, storage or other farm use. A processing facility or establishment must comply with all applicable siting standards, but the standards may not be applied in a manner that prohibits the siting of the processing facility or establishment. A county may not approve any division of a lot or parcel that separates a processing facility or establishment from the farm operation on which it is located.***

RESPONSE: The Decision does address subsection (1) above. The appellants challenge the Decision on the grounds that the Decision needed to address that subsection and the correlating Oregon Revised Statute, ORS 215.255.

Both subsections (1) and (7) (see below) offer independent basis on which a use may be approved in the EFU-3 zone. In this case, the applicant sought approval of its hemp processing facility as a "commercial use in conjunction with farm use in the EFU-3 zone" under subsection (7); not subsection (1). Staff believes the applicant only needs to seek approval under subsection (7).

If subsection (1) applies, under it and ORS 215.255, there is a requirement that ¼ of the crops that are processed on site be produced on site and that the processing facility be less than 10,000 sq ft. Since Staff does not believe subsection (1) or ORS 215.255 apply this application, we do not believe it is necessary to apply those standards. In this case, the applicant seeks a conditional use permit for a different use.

If the Court disagrees, the applicant will need to file a new application under subsection (1). If they do so, the application will only be subject to standards and will not be processed as a conditional use. Doing so will likely limit the County's ability to impose conditions to limit the impact on the nearby

property owners.

(7) Commercial activities in conjunction with farm use may be approved when:

(a) The commercial activity is either exclusively or primarily a customer or supplier of farm products;

(b) The commercial activity is limited to providing products and services essential to the practice of agriculture by surrounding agricultural operations that are sufficiently important to justify the resulting loss of agricultural land to the commercial activity; or

(c) The commercial activity significantly enhances the farming enterprises of the local agricultural community, of which the land housing the commercial activity is a part. Retail sales of products or services to the general public that take place on a parcel or tract that is different from the parcel or tract on which agricultural product is processed, such as a tasting room with no on-site winery, are not commercial activities in conjunction with farm use.

RESPONSE: The applicant is proposing an outdoor processing facility to extract industrial hemp for oil pursuant to this subsection (7). As stated in the applicant's Burden of Proof, the industrial hemp processed at the facility will be grown in Crook County and "processing of the subject property's crop as well as those other crops of the subject property's owner and those of off-site growers directly support the hemp industry and allow the Applicant to support agriculture practices in Crook County".

As shown on the site plan and mentioned in the Burden of Proof the existing structure to be utilized is located in an area of the property is not in crop production. Thus, staff does not believe it results in a loss of productive acreage.

The Planning Commission found:

The applicant is proposing an outdoor processing facility to extract industrial hemp for oil. As stated in the Burden of Proof, the industrial hemp processed at the facility will be grown in Crook County and "processing of the subject property's crop as well as those other crops of the subject property's owner and those of off-site growers directly support the hemp industry and allow the Applicant to support agriculture practices in Crook County"

As shown on the site plan and mentioned in the Burden of Proof the existing structure to be utilized is located in an area of the property not in crop production thus not a loss of productive acreage.

The proposal is for processing an agricultural crop grown in the state of Oregon, which is considered to be the local area and is essential to the practice of agriculture. Currently the ODA reports show 1,675 acres of industrial hemp grown in Crook County. The commercial activity meets the criteria for operating in conjunction with farm use.

The applicant shall provide a copy of the annual production report submitted to Oregon Department of Agriculture to the community Development Department to show continued industrial hemp processing usage. The applicant shall also provide a copy of the Approval Land Use Compatibility Statement from Oregon Department of Agriculture for operation of a processing facility. See [Planning Commission] Conditions of Approval 6 and 7.[1]

The appellants challenge the adequacy of the above finding because:

1. It is not possible to discern from the findings which subpart of CCC 18.16.015(7) is being applied to the application.

2. It does not address evidence in the record that supports the commercial activity is essential to the practice of agriculture for surrounding agricultural practices.

3. There are no findings that the proposed use is "of such importance to the surrounding area such that it justifies the loss of the 17,000 sq. ft. agricultural land and agricultural structure…."

4. The findings do not analyze that the proposed commercial activity will significantly enhance the farming enterprises of the local agricultural community.

5. There is no finding that the is a primary farm use on the subject property, or that the subject property engaged in farm use.

6. The Decision relies on a conclusory finding that the proposed use is a commercial use in conjunction with farm use.

Regarding the first argument, under subsection (7), there are three grounds on which the commercial activity might be approved. For clarity, if the County Court agrees with the Planning Commission, to address the appellants' concerns, it should confirm which of the three criteria found in subsection (a) thru (c) the applicant meets and provide the required analysis. Staff believes the Planning Commission approved the commercial activity pursuant to subsection (c) since the Planning Commission's decision discusses the benefit to the local agricultural industry. That said, the applicant might also meet subsection (a) since it is primarily a customer of an agricultural product (raw hemp).

As to the second argument, the appellants contend the finding failed to address whether the use is essential to the practice of agriculture under subsection (b). The Planning Commission relied on CCC 18.16.015(7)(c) as the basis of its approval, so staff does not believe addressing whether the proposed use is "essential" to the practice of agriculture is necessary, since the applicant only needs to meet one of the three criteria listed in subsection (a) thru (c). To clarify, if the Court agrees with the Planning Commission's conclusion, this finding should specifically cite the subsection the applicant meets.

The appellant's third argument similarly relates to subsection (b). Staff does not believe the analysis suggested by the appellants is required.

The fourth argument contends the Planning Commission's findings fail to address whether the use will significantly enhance the local farming enterprises. Staff believes Planning Commission's decision

[1] The Planning Commission's Conditions of Approval are attached as Exhibit A.

addresses that issue, but could be restated in a way to clarify that its finding was made pursuant to subsection (c). If the Court agrees with the Planning Commission, additional analysis may help clarify for the appellants and public the grounds on which the use will significantly enhance agricultural operations.

In *Hiebenthal v. Polk County,* LUBA No. 2003-082 (2003)[2], LUBA analyzed whether a fruit processing facility enhanced the farming enterprises of the local agricultural community. It found the "farming enterprises of the local" community were small-scale fruit growers who testified that prior to the proposed fruit processing activity, they had limited or non-existent market for their fruit. *Heibenthal,* pg*. 6*. Similarly, the applicant stated in its original Burden of Proof that its operation will process hemp that is (1) grown on the tract that the subject property is part of (250-300 acres are in hemp production) (2) grown on surrounding properties and from local growers. Pg. 3. The applicant also testified that its operation will be significantly larger operation than currently exists in Crook County. *See* Transcript Dec. 15, 2019, at pg. 13. Thus, staff believes that there is substantial evidence that the proposed use will enhance the local agricultural community by providing local growers a large facility that will purchase and process its hemp.

Regarding the appellants' fifth argument, there is no cite to the code section that requires the analysis regarding the primary farm use. The appellants may wish to expand upon this argument to help the Court better understand. Staff is of the opinion that a commercial activity in conjunction with a farm use does not require a primary fam use on the subject property. *See Hiebenthal v. Polk County.*

Lastly, as to the sixth argument, the appellants contend that the Planning Commission's decision relies on a conclusory finding that may set precedent for large-scale industrial processing for any product derived from an agricultural crop. As an example, the appellants contend that weaving cotton into textiles or canning fruit are not commercial activities in conjunction with farm use. Staff believes the present case may be more akin to the lawful fruit processing facility discussed in *Hiebenthal*. As discussed above, that case involved a fruit processing facility that received fresh and frozen fruit, infused it with fruit juices and sweeteners, dried the fruit, packed it, and shipped the processed fruit to customers. Approximately 75% of the fruit process was grown within Oregon. Opponents argued that the fruit processing facility was an industrial use. LUBA disagreed and found that the use was a lawful "commercial activity in conjunction with farm use."

18.16.020, Conditional Use Review Criteria

Since the applicant seeks approval of conditional use (commercial activity in conjunction with farm use), it must demonstrate compliance with the following criteria and specific requirements for conditional uses.

(1) The use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use;

RESPONSE: The Planning Commission found: *"The proposed use has been found to be in conjunction with Farm Use. It is not expected to force a significant change in farm practices on surrounding farm properties."*

Appellants contend the above quoted finding does not meet the required evidentiary findings necessary to satisfy the criterion. To address the appellants' concern, if the Court agrees with the

[2] A copy of this case is attached to this Staff Report as Exhibit B.

Planning Commission's conclusion, some additional analysis explaining what the use will not force a significant change in farm or forest practices on surrounding lands will help clarify the finding. For example, the Court might want to consider the evidence in the record regarding the proposed use and how it compares to nearby farm uses and whether the new use will impose any change on those farm uses.

Staff is of the opinion that this criterion can be met because the evidence in the record shows the facility is relatively isolated from other farm operations (except the owner's hemp growing operation), the traffic is relatively limited (the no traffic study is required), and most of the complaints focused on residential use of neighboring properties (not testimony from farmers regarding the impact the proposed use will have on their farming operations).

(2) The use will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

RESPONSE: The Planning Commission found: *"The proposed use has been found to be in conjunction with farm use. It is not expected to force an increase in cost for the surrounding accepted farming practices."*

The appellants challenge this finding for the same reasons discussed above under subsection (1). If the Court agrees with the Planning Commission, staff is of the opinion additional analysis to support the finding, similar to that above, will assist in clarifying the basis of the finding.

(3) The proposed use will be compatible with vicinity uses, and satisfies all relevant requirements of this title and the following general criteria:

(a) The use is consistent with those goals and policies of the comprehensive plan which apply to the proposed use;

RESPONSE: The Planning Commission found:

> *As stated in the Burden of Proof, "Crook County's comprehensive plan indicates an objective 'to maintain a viable agricultural base, preserve agricultural lands for agriculture, and to protect agriculture as a commercial enterprise."' Crook County Comprehensive Plan (CCCP) p. 44." And then goes on to say "…the requested activities support agriculture in Crook County. The processing of the subject property's crop as well as those other crops of the subject property's owner and those of off-site growers directly support the hemp industry and allow the applicant to support agriculture practices in Crook County. Further, allowing the requested commercial activities in conjunction with farm use further serves "to protect agriculture as a commercial enterprise," which is consistent with the county's comprehensive plan.*

Appellants contend that the finding fails to show how the proposed use is consistent with the goals and policies of the comprehensive plan and policies. The Planning Commission's decision appears to conclude that because of the nature of the hemp processing use, it will support agricultural uses, specifically the hemp industry. The Planning Commission's finding might be sufficient. However, if the Court agrees, to clarify the County's finding, a statement to the effect that the Court is adopting the applicant's analysis as its finding is recommended.

(b) The parcel is suitable for the proposed use considering its size, shape, location,

topography, existence of improvements and natural features;

RESPONSE: The Planning Commission found: *"The subject property is currently in Farm Use, has improvements in place, is within the Exclusive Farm Use zone, and does not have any significant natural features."*

The appellants challenge this finding because the subject site is a DEQ hazardous waste cleanup site. The appellants primary contention appears to be that the Decision should have further analyzed how the proposed use will ensure how the hazardous waste below ground is not disturbed. The appellants contend additional information regarding the operation is necessary to confirm no disturbance will happen.

Staff is of the opinion that such analysis is not required by this code section. This section requires an analysis of whether the site is suitable based on its size, shape, location, existence of improvements and natural features. It does not require analysis of prior uses and left over waste.

(c) The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district;

RESPONSE: The Planning Commission found: *" The proposed use has been found to be in conjunction with Farm Use. It is not expected to substantially limit the permitted uses on surrounding properties, also zoned Exclusive Farm Use (EFU-3)."*

The appellants contend the proposed use brings an industrial use to the area and belongs in an industrial zone. Appeal, pg. 3. Accordingly, appellants argue use is a "clear alteration of the character of the area" and will lead to additional industrial uses on EFU lands. *Id.*

This criterion requires that the proposed use not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of the surrounding properties for the permitted uses listed in the underlying zoning district (EFU-3). The Planning Commission found the underlying uses would not impact the permitted uses on surrounding properties. The appellants do not expand upon how the use will substantially limit the permitted uses on surrounding properties in the EFU-3 zone.

If the Court agrees with the Planning Commission's conclusion, it may wish to add to the finding some additional reasoning. For instance, the Court might find it relevant that the use is relatively isolated from nearby farm uses, that the traffic minimal, and that there is limited (if any) testimony from nearby farmers explaining how the proposed use will substantially limit the permitted uses on surrounding properties. For instance, no one testified they would not be able to irrigate or harvest crops because of the use.

(d) The proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use; and

RESPONSE: The Planning Commission found:

The property is located within the Crook County Fire District (See Attachment C). An Engineer Review of the proposed equipment and installation prior to operation submitted to Crook County Fire and Rescue for their review and approval. (See

Condition of Approval 15)

Any gates require Knox Box system and roadways will be constructed of an all-weather surface, wide enough for fire department apparatus. (See Conditions of Approval 16)

Cornett Loop is designated a 'rural/urban local' road that is County Maintained. The Road Department has approved the existing access permit (CC# RP-13-0214). The applicant will use the secondary access from SW Cornett Loop on the east side of the property for access to the facility, pending approval of from the Crook County Road Master. (See [Planning Commission] Condition of Approval 11)

The appellants challenge this finding for several reasons. First, appellants believe the finding is faulty because there is no analysis of the suitability of SW Cornett Loop for the proposed use. Staff recommends the Court, if it agrees with Planning Commission, incorporate into this finding analysis of the applicant's traffic assessment letter (Second Supplemental Burden of Proof, Ex. 13). This letter is prepared by a licensed traffic engineer and provides substantial evidence that Cornett Loop is sufficient for the proposed use.

Second, the appellants challenge the finding because there is no evidence concerning the chemical use and storage, or fire prevention and suppression plan. If the Court agrees with the Planning Commission's decision, the Court might consider incorporating into its finding analysis of the evidence in the record submitted by the applicant's attorney that discusses safety. MacLeod Letter, Jan. 3, 2020. In addition, the applicant testified at the hearing on December 11, 2019, regarding fire suppression and chemical storage. *See e.g.,* Transcript Dec. 11, 2019, Pgs. 15-17.

Third, appellants challenge this finding because there is no analysis as to the impact on the public right-of-way when trucks stop to open and close the gate. Staff reiterates that the applicant submitted a Traffic Assessment Letter from a licensed traffic engineer that notes access is adequate. That said, if the Court is concerned about this issue, one option might be to require the gate required by the Planning Commission for Condition of Approval 16, be located far enough off Cornett Loop so that trucks can fully pull off the public right-of-way before exiting their vehicles to open the gate.

Fourth, appellants contend there is no evidence concerning the quantity of water to be used for the operation, and the source of the water. Appellants contend use of groundwater will have a substantial impact on the surrounding wells. Appellants also contend there is no evidence regarding the wastewater disposal and its effect on groundwater. The applicant testified that the processing operation uses very little water; it only uses water for drinking and washing hands. Transcript Dec. 11, pg. 13. The applicant testified that water is the "enemy" of its process because it is hard to separate alcohol from water. *Id.* Thus, staff believes a reasonable conclusion is that the water use is minimal and the wastewater disposal will not impact the groundwater.

Fifth, the appellants argue the finding fails to determine that the existing access is sufficient and adequate for the proposed use in conjunction with the other uses on the subject property if the secondary access is not approved by the roadmaster. The applicant has addressed access through the above referenced Traffic Assessment Letter.

(e) The use is or can be made compatible with existing uses and other allowable uses in the area.

RESPONSE: The Planning Commission found

> *The applicant states that "the requested activity will create no greater impact on the adjoining farm practices than presently exist. All of the surrounding properties presently contain farm uses and accessory farm structures, and most of them also contain one or more dwellings and outbuildings. Further, the subject property also has a dwelling as well as a number of farm accessory structures, such that adding an additional facility will be insignificant for overall operations on the subject property and the surrounding properties." The Planning Commission has imposed Conditions of Approval to increase compatibility with existing uses and other allowable uses.*

The appellants contend that the Planning Commission's finding is conclusory and that it must, at a minimum, describe the surrounding uses and other allowable uses, describe the proposed use in detail, and explain why the proposed use is or is not compatible with the existing uses and other allowable uses in the area. Appeal, pg. 4.

Staff is of the opinion the Planning Commission's decision is more than conclusory. That said, some additional analysis may be helpful in explaining to the parties and the public the basis of the decision. For instance, aerial photos in the record show that there are hay and alfalfa fields nearby. Additional analysis might also note that the proposed use will be inside an existing building, is separated from nearby farm uses, and thus unlikely to impact those existing or allowed uses.

CCC 18.180.010, Transportation Impact Analysis

(3) When a Transportation Assessment Letter (TAL) Is Required. If the provisions of subsections (2)(a) through (f) of this section do not apply, the applicant's traffic engineer shall submit a transportation assessment letter to Crook County planning department demonstrating that the proposed land use action is exempt from TIA requirements. This letter shall outline the trip-generating characteristics of the proposed land use and verify that the site-access driveways or roadways meet Crook County's sight-distance requirements and roadway design standards.

RESPONSE: The Planning Commission found:

> *The Applicant has submitted a Transportation Assessment Letter (TAL) (see attachment F) which states, "[t]he proposed industrial hemp farm will generate 17 to 55 weekday daily trips with less than 10 trips during the weekday p.m. peak hour. The site will rely on its previously permitted accesses to the County roadway system. With the level and types of travel a formal Transportation Impact Analysis should not be required." The applicant will use the secondary access from SW Cornett Loop on the east side of the property for access to the facility, pending approval of from the Crook County Road Master See [Planning Commission] Condition of Approval 11.*

Appellants contend that the estimated range of weekday trips is so great (17-55) that it cannot be based upon substantial evidence as to the number of commercial vehicle trips. The appellants challenge the credibility of the applicant's evidence, but the applicant, by submitting a letter from its traffic engineer, has complied with this criterion. Staff believes that if the appellants wanted to challenge the traffic engineer's conclusions, it should have done so with its own reliable information. Case law indicates that an engineer's findings are substantial evidence and best practice to challenge such evidence is to enter countering evidence from another epxert. Staff believes, without an opposing

engineer's findings to weigh against the applicant's expert, the applicant's traffic engineer's TAL constitutes substantial evidence.

CCC 18.160 CONDITIONAL USE STANDARDS

CCC 18.160.020, General Criteria Establish General Criteria for Conditional Uses.

In judging whether or not a conditional use proposal shall be approved or denied, the commission shall weigh the proposal's appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed and, to approve such use, shall find that the following criteria are either met, can be met by observance of conditions, or are not applicable:

(1) The proposal will be consistent with the comprehensive plan and the objectives of the zoning ordinance and other applicable policies and regulations of the county.

RESPONSE: The Planning Commission found:

> *The applicant states "[h]ere, the requested activities support agriculture in Crook County. The processing of the subject property's crop as well as those other crops of the subject property's owner and those of off-site growers directly support the hemp industry and allow the Applicant to support agriculture practices in Crook County. Further, allowing the requested commercial activities in conjunction with farm use further serves "to protect agriculture as a commercial enterprise," which is consistent with the county's comprehensive plan."*
>
> *The applicant shall provide a copy of the annual production report submitted to Oregon Department of Agriculture to the community Development Department to show continued industrial hemp processing usage. The applicant shall also provide a copy of the Approval Land Use Compatibility Statement from Oregon Department of Agriculture for operation of a processing facility. See [Planning Commission] Conditions of Approval 6 and 7.*

The appellants challenge the Planning Commission's findings as conclusory. Staff believes the finding states the reason it is consistent with the Comprehensive Plan, but that it might be helpful to include in the finding the specific comprehensive plan policy(ies) the proposed use is consistent with.

(2) Taking into account location, size, design and operation characteristics, the proposal will have minimal adverse impact on the (a) livability, (b) value and (c) appropriate development of abutting properties and the surrounding area compared to the impact of development that is permitted outright.

RESPONSE: The Planning Commission found:

> *In the Burden of Proof, the applicant has indicated the size of the subject property as a large rural location, with the existing structures located interior to the site. The applicant will use the secondary access from SW Cornett Loop on the east side of the property for access to the facility, pending approval of from the Crook County Road Master (See [Planning Commission] Condition of Approval 11).*
>
> *Noise generated by the operation of the processing equipment will not exceed 75db at*

all property boundaries for the subject property when no other equipment is running (See Condition of Approval 12).

Hours of Operation shall be a ten (10) hour shift within the hours of 6:00 to 18:00 – Monday through Friday. If a there is a change in operating hours the applicant shall provide notice to the Community Development Department to determine if a Modification is needed. (See [Planning Commission] Condition of Approval 8).

No facility employees will live in travel trailers or recreational vehicles on the subject property (See [Planning Commission] Condition of Approval 10).

The appellants contend that the finding regarding the expected noise impact is not adequate. No explanation as to why, though, is provided. Staff believes that the evidence in the record, including Ms. MacLeod's letters dated December 27, 2019, and January 3, 2020, including the attached exhibits, are sufficient to support the Planning Commission's finding that 75db is an appropriate.

To further minimize impact, the Planning Commission limited the Hours of Operation to a ten (10) hour shift within the hours of 6:00 to 18:00 – Monday through Friday. If a there is a change in operating hours the applicant shall provide notice to the Community Development Department to determine if a Modification is needed. (See Condition of Approval 8). The appellants also challenge this finding as not adequate. Again, no further explanation is provided. The applicant's provided evidence in support of this finding and related condition of approval in Ms. MacLeod's January 3, 2020, letter.

Lastly, the appellants contend that the Planning Commission should have required fencing and screening to mitigate lights, sounds, and visual blight of the operation. The Court can consider whether fencing and screening is appropriate as a condition of approval. If it elects not to include it is a condition of approval, staff recommends the Court explanation for why it is not required.

(3) The location and design of the site and structures for the proposal will be as attractive as the nature of the use and its setting warrants.

RESPONSE: The Planning Commission found:

The Applicant states "However, all of the Proposal will be compatible with the existing farm use accessory structures on the subject property and will maximize use of existing structures."

From the Revised Layout Plan the Applicant has shown to be using the existing hay structure cover and concrete pad with a proposed addition. The applicant has submitted a tentative addition for the facility (See Attachment E).

The Applicant shall acquire all necessary permits and approvals from relevant regulatory authorities including but not limited to the Crook County Building Official (See [Planning Commission] Condition of Approval 1).

An increase of 10% or more in the footprint from the tentative plan submitted with the application shall require notice to the Community Development Department to determine if a Modification is needed. An increase over 10% would trigger a Modification that would go before Planning Commission (See [Planning Commission] Condition of Approval 3).

Employee parking will be limited to the area along the western side of the existing arena/barn (See [Planning Commission] Condition of Approval 13).

Office space shall be shared with existing farm operations. No new buildings will be constructed without a site plan modification for the property (See [Planning Commission] Condition of Approval 14).

Staff does not believe the appellants challenge this finding.

(4) The proposal will preserve assets of particular interest to the county.

RESPONSE: The Planning Commission found: "*The proposal has been found to be in conjunction with farm use and thus preserves agricultural activity which is important to the county."* Staff does not believe the appellants are challenging this particular finding.

(5) The applicant has a bona fide intent and capability to develop and use the land as proposed and has some appropriate purpose for submitting the proposal, and is not motivated solely by such purposes as the alteration of property values for speculative purposes.

RESPONSE: The Planning Commission found:

As stated in the Burden of Proof, "Applicant presently operates a successful processing facility in Grass Valley, Sherman County, Oregon. As an experienced extraction processor of Hemp, Applicant anticipates bring[ing] its expertise and safe practices to an updated and modern operation anticipated for the Proposal.

The Applicant has already engineered and designed the outdoor processing facility (Exhibit 7 [of the original application]). Applicant originally planned the facility for a less-desirable location in Grass Valley, Sherman County, Oregon, but has since determined that the proposed location in Crook County is much more desirable, for not only Applicant but also for Crook County farmers such as the Shephards (subject property owners). Applicant has invested in obtaining structural engineering bid plans for the Proposal, which demonstrates its bona fide intent and capability to develop this Proposal."

The Applicant shall notify Crook County Community Development in writing of a change in ownership of the facility, including, but not limited to, a transfer of title or lease for a term of years. The Conditional Use approval for the commercial processing facility in conjunction with farm use is not transferrable and does not run with the property, but with the applicant as Central Oregon Processing LLC, Successor to Evergreen State Holdings LLC, or subsidiary thereof. (See Condition of Approval 5)

The Applicant shall provide a copy of the annual production report submitted to Oregon Department of Agriculture to the Community Development Department to show continued industrial hemp use. (See [Planning Commission] Condition of Approval 6)

The Applicant shall provide a copy of the Approved Land Use Compatibility Statement form from Oregon Department of Agriculture for operation of the processing facility. (See [Planning Commission] Condition of Approval 7)

The appellants challenge this finding on the grounds that the applicant's "desire" to site the processing

facility in Crook County does not provide substantial evidence or adequate findings to site the facility in the EFU zone.

Staff believes Planning Commission's finding demonstrates that the applicant has the bona fide intent to complete the development proposal and that the proposed use is not for alteration of property values for speculative reasons, in accordance with the above approval criterion.

18.160.030 ,General Conditions.

In addition to the standards and conditions set forth in a specific zone (i.e., the EFU-3 zone), conditional use standards, and other applicable regulations, in permitting a new conditional use or the alteration of an existing conditional use, the planning director or planning commission may impose conditions which it finds necessary to avoid a detrimental impact and to otherwise protect the best interests of the surrounding area or the county as a whole.

(1) Limiting the manner in which the use is conducted including restricting the time an activity may take place and restraints to minimize such environmental effects as noise, vibration, air pollution, glare and odor.

RESPONSE: The Planning Commission found:

> *Applicant states that the outdoor extraction process is designed to minimize impacts. Noise during three hours of an anticipated ten-hour shift will be equivalent to operating a tractor in the field (see Exhibit D). Noise generated by the operation of the processing equipment will not exceed 75db at all property boundaries for the subject property when no other equipment is running (See Condition of Approval 12).*
>
> *The applicant also states that odors from the processing facility will be minimal because extraction is a closed loop process (less odor than the currently growing hemp), with minimal exterior lighting. At this time lighting is proposed to be under the existing canopy. All new lighting shall be downcast and shielded. (See [Planning Commission] Condition of Approval 9)*

While the appellants do not directly challenge this finding, related issues are addressed elsewhere in their appeal and in this Staff Report.

(2) Establishing a special yard or other open space or lot area or dimension.

RESPONSE: Not applicable for this proposal

(3) Limiting the height, size or location of a building or other structure.

RESPONSE: The Planning Commission found:

> *The applicant is proposing to utilize an existing structure. Any expansion of the structure shall be subject to Crook County Code chapter 15. The Applicant shall acquire all necessary permits and approvals from relevant regulatory authorities including but not limited to the Crook County Building Official (See [Planning Commission] Condition of Approval 1).*
>
> *The development shall significantly conform to the site plan submitted with the*

proposal. Minor variations limiting the proposal are permitted upon review and approval of the Community Development Director. (See [Planning Commission] Condition of Approval 2)

An increase of 10% or more in the footprint from the tentative plan submitted with the application shall require notice to the Community Development Department to determine if a Modification is needed. An increase over 10% would trigger a Modification that would go before Planning Commission (See [Planning Commission] Condition of Approval 3).

Staff does not believe the appellants challenge this finding.

(4) Designating the size, number, location and nature of vehicle access points.

RESPONSE: The Planning Commission found:

The applicant will use the secondary access from SW Cornett Loop on the east side of the property for access to the facility, pending approval of [ ] the Crook County Road Master (See [Planning Commission] Condition of Approval 11).

(5) Increasing the amount of street dedication, roadway width or improvements within the street right-of-way.

RESPONSE: Cornett Loop is an urban/rural local designated road and is maintained by Crook County Road Department. Not applicable for this proposal.

(6) Designating the size, location, screening, drainage, surfacing or other improvement of a parking area or loading area.

RESPONSE: The Planning Commission found: "*Employee parking will be limited to the area along the western side of the existing arena/barn. (See [Planning Commission] Condition of Approval 13)".*

Staff does not believe the appellants challenge this finding.

(7) Limiting or otherwise designating the number, size, location, height and lighting of signs.

RESPONSE: The applicant is not proposing any additional signage at this time.

(8) Limiting the location and intensity of outdoor lighting and requiring its shielding.

RESPONSE: The Planning Commission found: "*The applicant has submitted lighting details for their existing indoor facility in Grass Valley, OR. The same type of lighting is proposed to be used at this location. All new lighting shall be downcast and shielded. (See [Planning Commission] Condition of Approval 9)".*

Staff does not believe the appellants are challenging this finding.

(9) Requiring diking, screening, landscaping or another facility to protect adjacent or nearby property and designating standards for its installation and maintenance.

RESPONSE: The Planning Commission found: "*Due to the size of the subject parcel, proposed facility*

and proximity to neighboring dwellings no additional screening is needed".

The appellants contend:

> *There is no substantial evidence in the record regarding the industrial plant's distance to neighboring homes. Therefore, any Finding concerning the distance between the conflicting uses is in error.*

Staff believes appellants aim the above argument at the Planning Commission's finding for this criterion. There is evidence in the record regarding distance between properties. This evidence includes an aerial photo that shows the distance from the proposed use to nearby properties up to 2,500'. Amended Staff Report, Exhibit B. Staff believes that is sufficient evidence to support a finding that additional screening is not necessary.

(10) Designating the size, height, location and materials for a fence.

RESPONSE: The Planning Commission found, *"Due to the size of the subject parcel, proposed facility and proximity to neighboring dwellings no additional fencing is needed."*

Staff incorporates its comments from the above section here.

(11) Protecting and preserving existing trees, vegetation, water resources, wildlife habitat or other significant natural resources.

RESPONSE: The Planning Commission found:

> *The subject property is not located in a wildlife overlay and there are no mapped raptor nests. The proposal does not include any removal of existing vegetation or trees. There are no other significant natural resources on site.*

The appellants contend that there is no analysis or finding addressing the water resource impact. It is not clear to staff whether this is directed at this finding or not. In any case, as noted above, the applicant testified that the use will only use water for drinking and washing hands. Staff notes that additional water use is likely for operation of the septic system. In any case, because the processing process is closed loop and the facility is designed to be more or less self-contained, the risk to ground water appears to be minimized.

(12) Other conditions necessary to permit the development of the county in conformity with the intent and purpose of this title and the policies of the comprehensive plan

18.160.050(10) Commercial Use or Accessory Use not Wholly Enclosed Within A Building, Retail Establishment, Office, Service, Commercial Establishment, Financial Institution or Personal or Business Service Establishment on a Lot Abutting or Across the Street from a lot in a residential zone.

In any zone, a commercial use or accessory use not wholly enclosed within a building or a retail establishment, office, service commercial establishment, financial institution, or personal or business service establishment on a lot abutting or across the street from a lot in a residential zone may be permitted as a conditional use subject to the following standards:

(a) A sight-obscuring fence of evergreen hedge may be required by the planning director or planning commission when, in the director's or its judgment, such a fence or hedge or

combination thereof is necessary to preserve the values of nearby properties or to protect the aesthetic character of the neighborhood or vicinity.

RESPONSE: The Planning Commission found:

The applicant states the property is located in a rural area on 160 acres and is surrounded by an additional 754.74 acres owned by the same property owner with active farming practices. There is significant distance between the proposed processing facility site, parking areas and the nearest home. (See Attachment B)

No additional fencing or hedges are required since the use is located on a large parcel, is surrounded by large parcels, all parcels feature the same zoning (EFU-3), and residences are spaced far apart.

An above criterion and response addresses the fencing and screening concern of the appellants.

(b) In addition to the requirements of the applicable zone, the planning director or planning commission may further regulate the placement and design of signs and lights in order to preserve the values of nearby properties; to protect them from glare, noise or other distractions; or to protect the aesthetic character of the neighborhood or vicinity.

(c) In order to avoid unnecessary traffic congestion and hazards, the planning director or planning commission may limit access to the property.

RESPONSE: The Planning Commission found:

Hours of Operation shall be a ten (10) hour shift within the hours of 6:00 to 18:00 – Monday through Friday. If a there is a change in operating hours the applicant shall provide notice to the Community Development Department to determine if a Modification is needed (See [Planning Commission] Condition of Approval 8).

The applicant will use the secondary access from SW Cornett Loop on the east side of the property for access to the facility, pending approval of from the Crook County Road Master (See [Planning Commission] Condition of Approval 11)

The staff report addresses related findings in prior responses.

Respectfully Submitted:

Will Van Vactor

Proposed Conditions of Approval:

Exhibit A

1. The Applicant shall acquire all necessary permits and approvals from relevant regulatory authorities including but not limited to the Crook County Building Official, Crook County Sanitarian, Crook County Fire Marshal, Oregon Department of Agriculture, Department of Environmental Quality, and State of Oregon Fire Marshal.

2. The development shall significantly conform to the site plan submitted with the proposal. Minor variations limiting the proposal are permitted upon review and approval of the Community Development Director.

3. An increase of 10% or more in the footprint from the tentative plan submitted with the application shall require notice to the Community Development Department to determine if a Modification is needed. An increase over 10% would trigger a Modification that would go before Planning Commission.

4. A change in operating characteristics (to include but not limited to a change processing solvent, byproduct, waste, or a 25% increase in daily production) shall require notice to the Community Development Department to determine if a Modification is needed.

5. The Applicant shall notify Crook County Community Development in writing of a change in ownership of the facility, including, but not limited to, a transfer of title or lease for a term of years. The Conditional Use approval for the commercial processing facility in conjunction with farm use is not transferrable and does not run with the property, but with the applicant as Central Oregon Processing LLC, Successor to Evergreen State Holdings LLC, or subsidiary thereof.

6. The Applicant shall provide a copy of the annual production report submitted to Oregon Department of Agriculture to the Community Development Department, and/or any other applicable authority described in Condition of Approval 1 (above), to show continued industrial hemp use.

7. The Applicant shall provide a copy of the Approved Land Use Compatibility Statement form from Oregon Department of Agriculture for operation of the processing facility.

8. Hours of Operation shall be a ten (10) hour shift within the hours of 6:00 to 18:00 – Monday through Friday. If a there is a change in operating hours the applicant shall provide notice to the Community Development Department to determine if a Modification is needed.

9. All new lighting shall be downcast and shielded.

10. No facility employees will live in travel trailers or recreational vehicles on the subject property.

11. Applicant will use the secondary access from SW Cornett Loop on the east side of the property for access to the facility, pending approval of Road Access from Crook County Road Master.

12. Noise generated by the operation of the processing equipment will not exceed 75db at all property

boundaries for the subject property when no other equipment is running.

13. Employee parking will be limited to the area along the western side of the existing arena/barn.

14. Office space shall be shared with existing farm operations. No new buildings will be constructed without a site plan modification for the property.

15. Engineer Review of the proposed equipment and installation prior to operation submitted to Crook County Fire and Rescue for their review and approval.

16. Any gates require Knox Box system and roadways will be constructed of an all-weather surface, wide enough for fire department apparatus.

17. Deliveries and haul outs shall be limited to Operating Hours. The applicant will coordinate with the Crook County School District to avoid pickup and drop off times.

Exhibit B

Page 1

WAYNE J. HIEBENTHAL, DAVID L. HIEBENTHAL and DELBERT BAILEY, Petitioners,
v.
POLK COUNTY, Respondent, and MEDURI FARMS, INC., Intervenor-Respondent.
LUBA No. 2003-082.
Oregon Land Use Board of Appeals.
September 9, 2003.

Appeal from Polk County.

Wayne J. Hiebenthal, David L. Hiebenthal and Delbert Bailey, Dallas, filed the petition for review. Wayne J. Hiebenthal and Delbert Bailey argued on their own behalf.

No appearance by Polk County.

Mark D. Shipman, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld Griggs PC.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED.

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

FINAL OPINION AND ORDER

Opinion by Briggs.

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NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit for a fruit processing facility.

MOTION TO INTERVENE

Meduri Farms, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor operates a fruit processing facility located on land zoned Exclusive Farm Use (EFU). The facility was first constructed in 1905, and has been owned by intervenor since 1993. Intervenor has substantially expanded the fruit processing business and its facilities since it acquired the subject property. Currently, intervenor employs approximately 40 persons year-round, and employs approximately four times that many on a seasonal basis.[1] In 2001, the main fruit drying facility was destroyed by fire. Petitioners appealed the county's "ministerial" approval of replacement facilities in *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002). We remanded the county's decision, concluding that the county could not approve an expansion of the prior nonconforming use through a ministerial decision. We also commented that at least some of the uses appeared to fall within the category of "commercial activities that are in conjunction with farm use," a use allowed pursuant to ORS 215.283(2)(a). 41 Or LUBA at 329.

On remand, the county reviewed an application for a conditional use permit to allow essentially the same types and levels of uses that the county had previously approved in its

Page 3

prior ministerial decision. The county approved the application for the proposed commercial activities that are in conjunction with farm use, subject to conditions. This appeal followed.

Exhibit B

FIRST ASSIGNMENT OF ERROR

The fruit processing that occurs on the subject property includes: (1) receiving fresh and frozen fruit from growers; (2) infusing the fruit with fruit juices and other sweeteners; (3) drying the sweetened fruit; (4) packaging; and (5) shipping the processed fruit to customers, primarily institutions and secondary processors. While there is some dispute as to the percentage of fruit derived from the various sources, the hearings officer found that approximately 75 percent of the fruit processed at intervenor's facility is grown within Oregon, with 25 percent of that fruit being grown in the Willamette Valley. The remaining 25 percent is purchased from national and international fruit growers, including growers located in Mexico and Turkey. The closest fruit supplier is located approximately 12 miles from the subject property. The challenged decision requires that at least 50 acres of intervenor's property be planted in fruit trees, and requires that at least 25 percent of the crop harvested from those 50 acres be processed at intervenor's facility.

Petitioners argue that the disputed fruit processing facility does not qualify as a "commercial activit[y] that [is] in conjunction with farm use" within the meaning of ORS 215.283(2)(a) and Polk County Zoning Ordinance (PCZO) 136.050(I). Petitioners contend that the proposed use is more properly categorized as an industrial use, because none of the fruit processed is grown in the immediate vicinity of the subject property, and the waste generated by the facility requires industrial wastewater treatment. According to petitioners, the scale of intervenor's facility is far greater than is necessary to process the small volume of fruit that is purchased from area growers. Petitioners rely on *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989), for the proposition that nonfarm uses such as a fruit processing facility may be allowed on EFU-zoned land only if the use is no larger than is necessary to enhance the farming activities of the local agricultural community. According to

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petitioners, the proposed fruit processing facility does not support local farmers because: (1) a majority of the fruit is grown outside of the immediate area; and (2) wastewater and dust generated by the facility effectively eliminate agricultural use of adjoining properties.[2]

Intervenor responds that the only limitation on commercial uses in conjunction with farm use is whether the proposed use will violate the standards set out in ORS 215.296(1).[3] According to intervenor, the hearings officer properly found that the fruit processing facility will enhance local markets for fruit growers in the area, will provide an incentive for the owner of the subject property to grow fruit that will be processed at the facility and, as conditioned, will not significantly affect agricultural practices occurring on adjacent and nearby properties consistent with ORS 215.296(1). In addition, intervenor asserts that the conditions of approval imposed by the challenged decision will ensure that any conflicts with adjacent agricultural activities are minimized. Intervenor states that the conditions of approval include: (1) compliance with Oregon Department of Environmental Quality (DEQ)

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waste water disposal requirements; (2) the application of dust suppression agents on the gravel roads fronting the processing facilities on the south and west; (3) limitations on noise and light sources so that the fruit processing activities will have a minimal impact on neighboring farm residences.

In *Craven*, the Oregon Supreme Court dealt with the question of whether a winery that would receive grapes from growers in the

Exhibit B

area, and would include a tasting and sales room where wine and winery related retail items would be sold was properly categorized as a "farm use" that might be permitted outright on EFU-zoned land, or whether it was a "commercial activit[y] that [is] in conjunction with farm use" under ORS 215.283(2)(a), that could be permitted provided the use complied with applicable conditional use criteria.[4] The Court analyzed each aspect of the proposed use, concluding that (1) growing grapes fell within the definition of "farm use" set out in ORS 215.203(2)(a); and (2) wineries and tasting rooms are "accepted farming practices" because they are "customarily utilized in conjunction with" vineyards.[5] The Court also concluded that a winery building may be constructed prior to the maturation of grapes on the property, as a "nonresidential building customarily provided in conjunction with farm use" pursuant to ORS 215.283(1)(f), provided the "structure's size and capacity must be proportional and commensurate to the existing level of dedication of land in that immediate area to the crop for which the structure is suited."[6]

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Craven, 308 Or at 286. Turning to the retail sales aspect of the proposed use, the Court held that such retail uses could be allowed as commercial activities that are in conjunction with farm use, so long as the commercial activity "enhance[s] the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates." *Id.* at 289.

As *Craven* makes clear, the limitation on the size of a proposed use that is connected to agricultural activities and how that proposed use is categorized under the EFU statutory scheme is dependent on whether an applicant seeks to have the use approved outright as a "farm use" pursuant to ORS 215.203(2)(a), an "accepted farming practice" pursuant to ORS 215.203(2)(c), an "other building customarily provided in conjunction with farm use" pursuant to ORS 215.283(1)(f) or a "facility for the processing of farm crops" pursuant to ORS 215.283(1)(u). There is no such limitation for uses permitted under ORS 215.283(2)(a).

The only limitations placed on uses that may be permitted as "commercial uses in conjunction with farm use" within the meaning of ORS 215.283(2)(a) are that the proposed use must: (1) "enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates;" and (2) satisfy ORS 215.296. *Craven*, 308 Or at 289 and ORS 215.283(2).

In this case, the "farming enterprises of the local community" are small-scale fruit growers who testified that, prior to intervenor's fruit processing activity, they had a limited or non-existent market for their fruit. They also testified that if intervenor's conditional use permit is approved, they have an incentive to continue their agricultural endeavors. In addition, the conditions of approval require intervenor to establish its own orchards, thereby providing for continued agricultural production on the subject property. That evidence is sufficient to establish that the proposed use will "enhance the farming enterprises of the local

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agricultural community" and is therefore a "commercial activit[y] that [is] in conjunction[7] with farm use" within the meaning of ORS 215.283(2)(a).

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

PCZO 136.060 provides, in relevant part:

"To ensure compatibility with farming and forestry activities, the * * * hearings body

Exhibit B

shall determine that a use authorized by [PCZO 136.020(I)] meet the following requirements:

"(A) The proposed use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

"(B) The proposed use will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use."[8]

Petitioners argue that the hearings officer's conclusion that the fruit processing facility does not significantly increase the cost of accepted farm practices or force a significant change in accepted farm practices is not supported by substantial evidence.

Petitioners argue that evidence in the record demonstrates that their farm activities have been significantly hampered by the expansion of the fruit processing operations. Petitioners contend that traffic associated with the facility has increased dust, and has resulted in nearby roads being blocked as semi-trucks wait to access the loading areas and as workers arrive and leave the facility. Petitioners further argue that the noise from the dryer and the horns from the trucks have disturbed cattle and have made it difficult to perform certain farm chores.

Petitioners also point out that intervenor violated DEQ wastewater discharge rules in the past, and contend that it is unlikely that intervenor will be complying with those rules in the future. According to petitioners, the impact of these conflicts has resulted in the need to: (1)

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dredge irrigation ditches to clear out the wastewater residue; (2) purchase additional cattle feed to compensate for the decline in hay production caused by dust; and (3) limit the types of farming operations to those that are not affected by fruit wastewater, dust or noise.

Petitioners argue that, at the very least, the size of the fruit processing facility should be reduced to eliminate dust and traffic conflicts, to reduce the noise from the dryers, and to reduce the wastewater generated by the facility.

Intervenor responds that there is evidence in the record that petitioners overstate both their existing agricultural practices and the impact of the fruit processing activities on those practices. In addition, intervenor points out that the hearings officer imposed conditions of approval to ensure that the anticipated impacts will not *significantly* affect accepted farm and forest practices on nearby properties.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C).

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991).

In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The hearings officer adopted five and a half pages of findings addressing PCZO 136.060. With respect to traffic, the hearings

Exhibit B

officer relied on a traffic analysis performed by intervenor's traffic engineer to conclude that the number of vehicles using the nearby gravel roads "fall well below capacity and below normal levels for these types of roadways." Record 33. The hearings officer found, to the extent that dust may have an impact on nearby

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farm practices, that the dust generated by the trucks could be minimized by the imposition of conditions that require dust suppression. The hearings officer imposed conditions of approval that require that venting from the fruit dryer be placed to direct exhaust noise back onto the subject property rather than toward the farm to the west, and that semi-trucks be equipped with special back-up beepers to lessen the noise from trucks backing into the loading areas.

The hearings officer concluded that those conditions are adequate to ameliorate the incidental impact the noise generated by the fruit processing facility has on neighboring farm practices.

Finally, the hearings officer cited to evidence in the record regarding intervenor's actions to comply with DEQ regulations and concluded that the efforts that intervenor had undertaken to correct wastewater discharge violations is a reasonable indicator of intervenor's good faith attempts to comply with DEQ regulations, and imposed conditions of approval that require continued compliance with those regulations. All of the hearings officer's conclusions are supported by substantial evidence. Petitioners' disagreement with those conclusions does not mean they are not supported by substantial evidence.

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

PCZO 119.100 provides:

"Discontinuance of * * * any conditional use for a continuous period of six (6) months shall be deemed an abandonment of such conditional use." Because the conditional use approved is seasonal in nature, the hearings officer concluded that it was more appropriate to extend the period of discontinuance to one year.[9] Petitioners argue:

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"In direct conflict with [PCZO 119.100], the Hearings Officer[`s] decision allows the subject conditional use to be discontinued for more than six months * * *. Because the Hearings Officer's decision is inconsistent with the express language of the PCZO, this decision must be reversed or remanded." Petition for Review 21.

PCZO 119.060 permits a hearings officer to change the requirements of the ordinance, provided a concurrent variance request is submitted.[10] Here, the hearings officer adopted a condition of approval that is flatly inconsistent with PCZO 119.100. In the absence of some evidence that the hearings officer imposed the condition in response to a variance request, we conclude that the hearings officer erred in extending the time that the use may be discontinued in order to avoid the legal conclusion that the conditional use has been abandoned.[11]

The second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the fruit processing facility is a much more intensive use than the EFU-zoned property can sustain. According to petitioners, the wastewater that is generated by the facility and dispersed over intervenor's orchards has killed the orchards, and has drained into petitioner Bailey's

Exhibit B

ditches. Petitioners contend that such a use is not

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consistent with a Statewide Planning Goal 3 (Agricultural Lands) guideline that requires local "development actions" "not exceed the carrying capacity of [air, land and water resources of the planning area]." [12] Petitioners argue that they raised this issue below, but that the hearings officer did not address this concern in the challenged decision.

Failure to address a specific issue raised by a party below, where that issue is relevant to compliance with an applicable approval criterion, is a basis for remand. *Moore v. Clackamas County*, 29 Or LUBA 372, 381 (1995). However, we do not agree with petitioners that the cited guideline imposes an approval standard for a permit for a use authorized under ORS 215.283(2) and local implementing regulations. Absent a more focused argument from petitioners that explains why such is the case, we decline to conclude that the planning guideline provides an approval standard in this case.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

PCZO 136.050(I) requires that at least "a portion [of the farm products processed as a commercial use in conjunction with farm use must be] produced by the subject farming operation." The fruit processing facility is located on tax lot 201. Intervenor also owns tax lots 200 and 600, which are adjacent to tax lot 201. Combined, the three tax lots include 105.04 acres. Record 21. The hearings officer found that approximately 50 acres of the subject property, comprised of tax lots 200, 201 and 600, was planted in fruit trees in 2000.

As discussed earlier, the hearings officer conditioned approval of the fruit processing facility upon a showing that 50 acres of the subject property will be planted with crops that will, in part, be processed at the facility.

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Petitioners argue that the hearings officer's conclusion that the fruit processing facility is located on a 105.04-acre tract, and that 50 acres of that tract can be put to orchard use is not supported by substantial evidence. Petitioners point to evidence that at least a 24-acre portion of tax lot 600 is included in a list of adjacent farming operations, and is not properly included in the 105.04-acre total.[13] According to petitioners, the hearings officer relied on testimony from intervenor to conclude that the 50-acre planting requirement could be met.[14] However, petitioners argue, that evidence is not reliable, because it assumes that the subject property includes 215 acres, 110 acres more than are actually included in tax lots 200, 201 and 600.

Petitioners also dispute the evidence from intervenor that intervenor is growing fruit on its property. Petitioners point to evidence in the record that undermines that evidence, and argue that, in light of the contravening evidence, the hearings officer's conclusion that at least 50 acres of the subject property is planted in fruit trees is not supported by substantial evidence.

The hearings officer found that

"PCZO 136.050(I) is the sort of provision that breeds contention, in that it does not expressly quantify the term `portion.' [Opponents are] undoubtedly correct in asserting that one or two pieces of fruit would not constitute a `portion' by any reasonable interpretation, but it is less clear that a `significant' amount of crops processed must originate on the subject property * * *. Moreover, PCZO 136.050(I) does not expressly state whether the `portion,' whatever amount that may be, must come

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from crops currently growing when the application is submitted, or may come from proposed plantings. Opponents predicate their arguments on the allegedly poor yield of current plantings. Applicant points out, on the other hand, that in *Craven*, the

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applicant had planted only some of its property, and was not yet harvesting any grapes from its own land [when the conditional use permit for the winery and associated commercial activities was approved.]

"* * * Based on a review of year 2000 aerial photos, the subject [property] is planted in approximately 50 acres of mature orchard trees. The Hearings Officer finds that in order to satisfy the `portion' requirement and provide for alternative means to market farm products such as direct sales and still ensure that the proposed processing facility is established in conjunction with the existing farming operation on the subject [property], the applicant * * * must process at least 25% of its 5-year average of harvested orchard crop from the subject [property] at the proposed processing facility. The Hearings Officer finds that a five-year reporting requirement would allow for fluctuations in the local economy and agricultural markets. The applicant shall retain at least 50 acres of orchard trees on the subject [property.] Verification of the required volume shall be established by submission of 5-year crop harvest and processing records for the subject [property] and a signed affidavit from the orchard manager to the Polk County Planning Division. The first crop report and affidavit is due to the Planning Division after the harvest of the 2005 crop. * * * A condition to this effect shall be included in any approval of the application." Record 31.

It is fairly clear from the record that the subject property includes approximately 105 acres and is comprised of tax lots 200, 201 and 600. The fact that there may be evidence that inadvertently includes a portion of tax lot 600 in a list of adjacent farming operations, and does not include it with the remainder of property owned by intervenor does not undermine the evidence relied upon by the hearings officer that the subject property encompasses 105 acres. Also, contrary to petitioners' assertions, the hearings officer did not rely on testimony from intervenor about the number of acres that are or will be planted to conclude that a portion of the subject property currently contains *any* productive orchard. Rather, the hearings officer concluded that the standard is satisfied if intervenor: (1) plants 50 acres in fruit trees that will produce a first yield by 2005 at the latest; (2) keeps 50 acres in active agricultural cultivation; and (3) processes at least 25 percent of the yield from the 50 acres at intervenor's fruit processing facility. Petitioners' assignment of error provides no basis for reversal or remand.

The fifth assignment of error is denied.

The county's decision is remanded.

Notes:

1. One of the underlying disputes in this matter is the extent to which intervenor's business is a pre-existing nonconforming use. The challenged decision takes the position that all of the buildings that have been built on the subject property since 1993, with the exception of on 700-foot section of the drying facility, have been constructed without land use approval and that the challenged decision is intervenor's attempt to legalize the use.

2. At oral argument, petitioners also argued that fruit processing facilities must be limited to the scale allowed by ORS 215.283(1)(u). ORS 215.283(1)(u) allows, as a use permitted in an EFU zone:

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"A facility for the processing of farm crops located on a farm operation that provides at least one-quarter of the farm crops processed at the facility. The building established for the processing facility shall not exceed 10,000 square feet of floor area exclusive of the floor area designated for preparation, storage or other farm use or devote more than 10,000 square feet to the processing activities within another building supporting farm uses. A processing facility shall comply with all applicable siting standards but the standards shall not be applied in a manner that prohibits the siting of the processing facility." However, that argument is not included in the petition for review and, therefore, we do not consider it further.

3. ORS 215.283(2)(a) permits "commercial activities that are in conjunction with farm use." ORS 215.296(1) provides, in relevant part:

"A use allowed under ORS * * * 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:

"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

4. *Craven* was decided before the legislature amended ORS 215.283(2) to refer to the criteria set out in ORS 215.296.

5. "Accepted farming practices" are uses that are allowed in EFU zones without further review. ORS 215.203(2)(c) defines "accepted farming practices" as:

"[A] mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use."

6. The current version of ORS 215.283(1)(f) allows "other buildings" customarily provided in conjunction with farm use rather than "nonresidential buildings" as the statute provided at the time in *Craven*. The minor change in language does not affect our resolution of the assignment of error.

7. We address petitioner's contentions that ORS 215.296 is not satisfied in our discussion under the third assignment of error.

8. ORS 215.296(1) imposes the identical standards. *See* n 3 (setting out ORS 215.296(1)).

9. The hearings officer's findings state, in relevant part:

"PCZO * * * 119.100 states that discontinuance of * * * any conditional use for a continuous period of six months shall be deemed an abandonment of such conditional use. However, because the proposed commercial activity in this case (farm product processing) most likely will be seasonal, the discontinuance of the proposed conditional use for a one-year period would be reasonable and appropriate for constituting an abandonment of this proposed conditional use." Record 39.

10. PCZO 119.060 provides, in relevant part:

"Any reduction or change of * * * requirements of the ordinance must be considered as varying the ordinance and must be requested as a concurrent variance request, as described in [PCZO] 119.050."

PCZO 119.050 provides:

"Variances may be processed concurrently and in conjunction with a conditional use application and when so processed will not require an additional public hearing or additional filing fee."

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11. However, we note that a seasonal fluctuation in business activity might not necessarily equal a "discontinuance," "interruption," or "abandonment." *Polk County v. Martin*, 292 Or 69, 76, 636 P2d 952 (1981).

12. Goal 3, Guidelines, Planning, paragraph 2, provides:

"Plans providing for the preservation and maintenance of farm land for farm use, should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources."

13. It is not clear from the record or petitioners' arguments whether tax lot 600 includes only 24 acres, or whether it is larger. However, the actual size of tax lot 600 is not material to our resolution of this assignment of error.

14. Petitioners cite to intervenor's comments at Record 71, which state:

"* * * [Thirty] acres of the subject property is currently planted in Cherries and 85 acres are planted in prunes. Further * * * another 100 acres of the property will be planted in Cherries."
